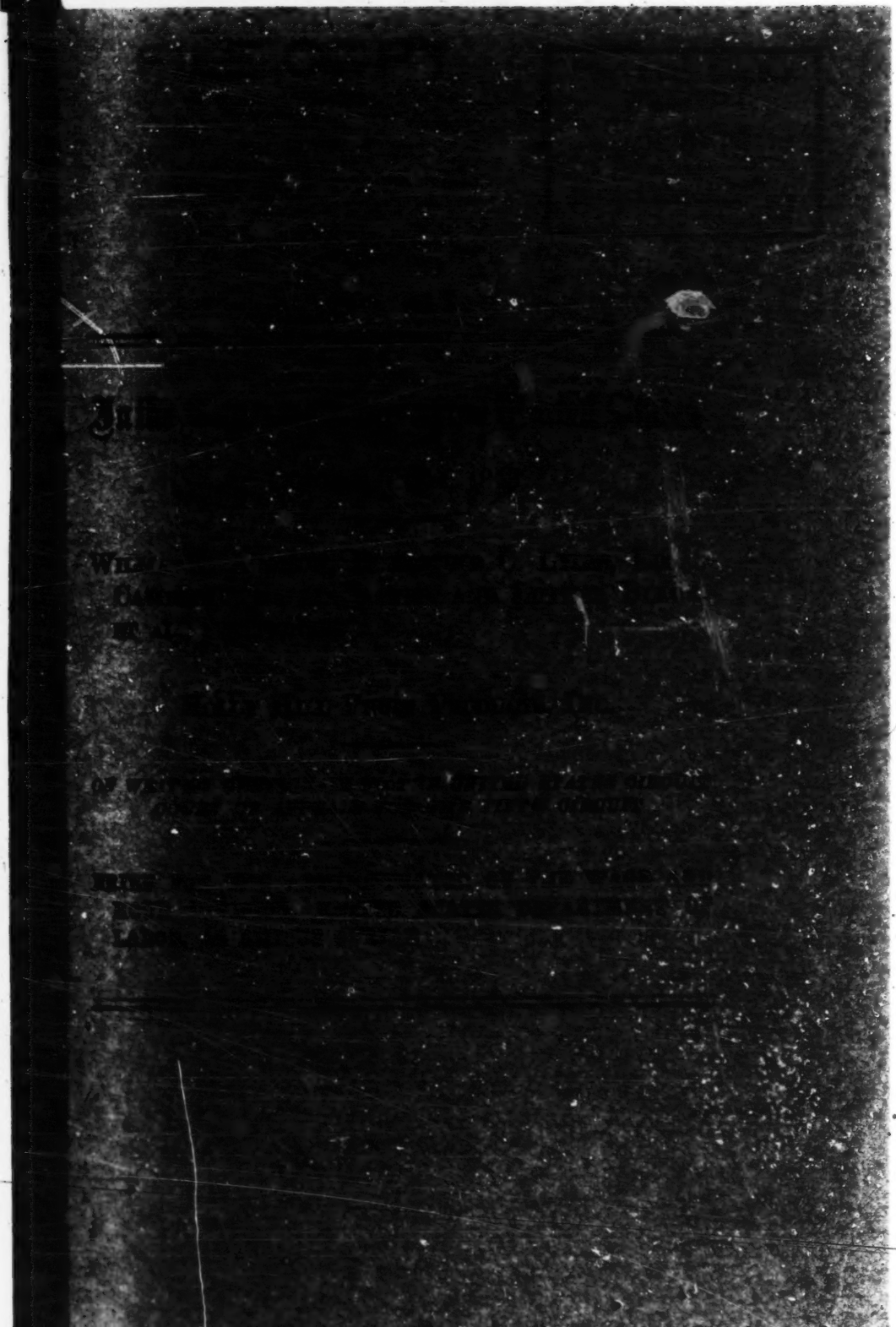


INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	4
Argument	6
I. The Administrator's current definition of "area of production" is a valid exercise of the power to define granted in Section 13 (a) (10)	12
A. Section 13 (a) (10) delegates to the Administrator power in defining "area of production" to count as relevant other factors than those that can be expressed in terms of space alone	12
1. The term "area of production" does not refer to a region or territory alone so clearly as to forbid recourse to other material evidence to ascertain the legislative meaning	14
2. The legislative history shows that Congress used "area of production" in Section 13 (a) (10), as it had been used under the N. R. A. codes, to draw the line between agricultural and industrial workers, a task involving use of other criteria as well as geographic tests, and that Congress deliberately inserted the words "as defined by the Administrator" to empower the Administrator to draw that line and resolve such issues as whether employees in large canning factories should be exempt as agricultural workers solely because of location	14
3. The impossibility of drawing a purely geographical demarcation of the "area of production" without causing economic dislocations and unfair competitive conditions shows that Congress cannot have intended to confine the Administrator's authority to define to a power to demarcate geographical regions	16
	31

Argument—Continued.
I. The Administrator's current definition, etc.—Con. Page
B. The current definition was a reasonable choice adapted to the statutory end 40
1. The proceedings leading to promulgation of the current definition 40
2. The evidence at the hearings shows the current definition to be reasonable 49
II. The decision below invades the province of the Administrator 60
Conclusion 66
Appendix I. History of the several definitions of area of production under Section 13 (a) (10) 67
Appendix II. Hearings on definitions of area of production 75
Appendix III. Legislative history of Section 13 (a) (10) 76
Appendix IV. Maps showing geographical distribution of production of sundry commodities 129

CITATIONS

Cases:
Booth v. *Indiana*, 237 U. S. 391 60
Bowie v. *Gonsales*, 117 F. (2d) 11 65
Brotherhood of Locomotive Engineers v. *Missouri-Kansas-Texas Railroad Co.*, No. 23, present term, decided November 22, 1943 61
Brotherhood of Locomotive Engineers v. *Southern Pacific Co.*, Nos. 27 and 41, present term, decided November 22, 1943 61
Carmichael v. *Southern Coal & Coke Co.*, 301 U. S. 495 60
Federal Radio Comm. v. *General Electric Co.*, 281 U. S. 464 63
Federal Radio Comm. v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 63
Federal Security Administrator v. *Quaker Oats Co.*, 318 U. S. 218 ..... 14, 61
Fleming v. *Farmers Peanut Co.*, 128 F. (2d) 404 ..... 6, 13
Fleming v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567 65
Gray v. *Powell*, 314 U. S. 402 9
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 65
Holy Trinity Church v. *United States*, 143 U. S. 457 16
Houston v. *St. Louis Independent Packing Co.*, 249 U. S. 479 61
Jeffrey Mfg. Co. v. *Blagg*, 235 U. S. 571 60
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428 63
Knight v. *Mantel*, 135 F. (2d) 514 65
Manhattan Co. v. *Commissioner*, 297 U. S. 129 65
McDonald v. *Thompson*, 305 U. S. 263 64
Middleton v. *Texas Power & Light Co.*, 249 U. S. 152 60
National Broadcasting Co. v. *United States*, 319 U. S. 190 ..... 32, 61
Opp Cotton Mills v. *Administrator*, 312 U. S. 126 32

Cases—Continued. Page

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176... 60, 61
Piedmont & Northern Ry. Co. v. *Interstate Commerce Comm.*, 286 U. S. 299... 64
Railroad Comm. v. *Rowan & Nichols Oil Co.*, 310 U. S. 573.. 49, 61, 63
Railroad Retirement Board v. *Alton R. R. Co.*, 295 U. S. 330.. 63
Redland Foothill Groves v. *Jacobs*, 30 F. Supp. 996... 65
Richbourg Motor Co. v. *United States*, 281 U. S. 528... 28
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38... 60
Switchmen's Union of North America v. *National Mediation Board*, No. 48, decided November 22, 1943... 61, 63
United States v. *American Trucking Assns.*, 310 U. S. 534.. 7, 16, 32
United States v. *Bush & Co.*, 310 U. S. 371... 61
United States v. *Dickerson*, 310 U. S. 554... 16
United States v. *Morgan*, 307 U. S. 183... 65
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165... 62
Warring v. *Colpoys*, 122 F. (2d) 642... 65
Williams v. *Standard Oil Co.*, 278 U. S. 235... 62
Wright v. *Vinton Branch*, 300 U. S. 440... 28

Statutes:

Act of June 15, 1929, c. 24, 46 Stat. 11, 12 U. S. C., sec. 1141 (Agricultural Marketing Act), sec. 15... 23
Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 (Fair Labor Standards Act):
Sec. 2 (a)... 31, 38
Sec. 7 (b) (3)... 17, 58
Sec. 13 (a) (10)... 1, 2, 3, 4, 5, 6, 7, 10, 11, 15, 17, 19, 22, 24, 27, 30, 32, 33, 38, 39, 40, 46, 49, 50, 53, 56, 59, 61, 64
Sec. 16 (b)... 4
Securities Exchange Act of 1933, 15 U. S. C., sec. 77s (a)... 65
Securities Exchange Act of 1934, 15 U. S. C., sec. 78w (a)... 65

Miscellaneous:

Administrative Procedure in Government Agencies, Part I, pp. 67–68... 40
Farm and Ranch Schedules, U. S. Department of Agriculture, taken by Bureau of Census, U. S. Department of Commerce... 34
Press Release R–226... 42
Press Release G–60... 34, 37, 43, 44, 48, 51, 57, 58, 59
Press Release R–716... 43
Snyder, *Retrospective Operation of Overruling Decisions*, 1940, 35 Ill. Law Review 121... 65
3 F. R. 2536... 48, 67
3 F. R. 3072... 48, 68
4 F. R. 1009... 48, 68

Miscellaneous—Continued. Page

4 F. R. 1655 ... 48, 69
4 F. R. 2436 ... 48, 70
5 F. R. 2647 ... 48, 71
5 F. R. 3167 ... 48
6 F. R. 1476 ... 48, 72
6 F. R. 5165 ... 5, 48, 74
81 Cong. Rec. 7656 ... 18
81 Cong. Rec. 7876, July 30, 1937 ... 18, 19, 25
81 Cong. Rec 7877, July 30, 1937 ... 19, 29
81 Cong. Rec. 7887–7888, July 30, 1937 ... 29
81 Cong. Rec. 7947, July 31, 1937 ... 17, 29
81 Cong. Rec. 7948, July 30, 1937 ... 29
82 Cong. Rec. 1783–1784, December 17, 1937 ... 23, 24
82 Cong. Rec. 1802–1803, December 17, 1937 ... 17
83 Cong. Rec. 7326, May 23, 1938 ... 28
83 Cong. Rec. 7401, May 24, 1938 ... 17, 24, 26, 28
83 Cong. Rec. 7403, May 24, 1938 ... 28
83 Cong. Rec. 7406, May 24, 1938 ... 17, 29
83 Cong. Rec. 7407–7408 ... 24
83 Cong. Rec. 7419–7423, May 24, 1938 ... 17, 29
Administrator's Regulations:
Sec. 536.2 ... 41
Sec. 536.3 ... 48–49
Report by economists and investigators of the Wage and Hour Division, U. S. Department of Labor on:
Pacific Fruit Packers and Processors of Fruit and Report on Proposal to Broaden Wage and Hour Exemptions by Removing the "Area of Production" Limitation in Section 13 (a) (10) ... 42.
Report on the Citrus Fruit Packing Industry Under the Fair Labor Standards Act ... 42, 55
Report on the Fruit and Vegetable Canning Industry Under the Fair Labor Standards Act ... 42, 55
Tables Relating to the Fresh Fruit and Vegetable Packing Industry in Selected States and for Selected Products ... 42
History of the Code of Fair Certification for the Refrigerated Warehousing Industry, H. A. Chastka, 1936 ... 15, 21
History of the Labor Provisions, Code of Fair Competition for the Fresh Fruit and Vegetable Distributive Industry, Borden ... 19
Work Materials, No. 45, Part A, March 1936 ... 20
Final Report of the Attorney General's Committee on Administrative Procedure ... 62

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER, AND LUTHER BLACK, ET AL., PETITIONERS

v.

HOLLY HILL FRUIT PRODUCTS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

One of the issues involved in the instant case is the validity of the current definition of "area of production" which was issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to his statutory duty to determine the scope of the exemption contemplated by Section 13 (a) (10) of the Fair Labor Standards Act. Certain other issues are also involved, including the alleged

invalidity of definitions previously in force.[1] The Administrator has no immediate interest in these other issues; accordingly this *amicus* brief on his behalf is confined to the questions (1) whether the current definition is valid and (2) if it is invalid, what is the status of employers claiming an exemption under Section 13 (a) (10) while no valid definition is in force.

OPINIONS BELOW

The District Court's Findings of Fact, Conclusions of Law, and Judgment are not officially reported, but will be found in the Record at pages 186–198, 211–215. The opinion of the Circuit Court of Appeals (R. 224–231) is reported at 136 F. (2d) 323.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 24, 1943 (R. 231–232). The petition for a writ of certiorari was filed on August 2, 1943, and was granted on October 11, 1943. The jurisdiction of this Court is conferred

[1] The several forms in which "area of production" has been defined are printed in Appendix I. Alternative tests of "area of production" were also provided in the regulations during the period covered by this action. At the present time, however, with the exception of special definitions relating to dry edible beans and Puerto Rican leaf tobacco, the only basis for exemption is that quoted at pp. 4–5, *infra*, except that the exemption may be claimed by establishments employing up to ten employees instead of only seven or less.

by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Section 13 (a) (10) of the Fair Labor Standards Act provides an exemption from both the minimum wage and overtime requirements for employees employed "within the area of production (as defined by the Administrator)" engaged in various specified operations relating to the processing and preparation of agricultural and horticultural commodities for market. Under the current definition issued by the Administrator, an employee is employed within the "area of production" when: (a) all the materials on which he performs the specified operations come from farms "in the *general vicinity*" of the establishment where he is employed, and (b) the *number of employees* engaged in those operations in that establishment does not exceed seven. The questions are:

1. Whether the Administrator exceeded his discretion under the Act by limiting the size of the establishments in which employees might be exempt.

2. Whether, if the Administrator's definition is invalid, it was proper for the court to hold respondent exempt.

STATUTE INVOLVED

The statutory provision primarily involved is the exemption in Section 13 (a) (10) of the Fair

Labor Standards Act,[2] which provides that the minimum wage and overtime requirements shall not apply with respect to:

> any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

STATEMENT

This action was brought under Section 16 (b) of the Fair Labor Standards Act of 1938, by employees against a commercial canning company which employs over 200 workers, to recover minimum wages and overtime compensation, and liquidated damages, claimed to be due under the Act. It involves, among other things, the validity of regulations promulgated pursuant to Section 13 (a) (10) of the Act, quoted above, by the Administrator of the Wage and Hour Division, United States Department of Labor, defining the term "area of production" as follows:[2]

> An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10) * * *

[2] Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201.

> (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven. (29 C. F. R. (1940 Supp.) 536.2.)[2a]

The district court found as a fact that neither the "general vicinity" standard (R. 192) nor the number-of-employees test (R. 186–187) of the Administrator's definition had been met. It concluded that the Administrator's regulations were valid and that accordingly the employees were not excluded under Section 13 (a) (10) from the benefits of the Act.

The circuit court of appeals, solely on the basis of the statutory language and without the benefit of the record of the administrative hearings and findings upon which the definition was based,[3]

[2a] The definition quoted above is referred to in this brief as the "current" definition to distinguish it from previous definitions which proceeded on the basis of a mileage-population test. See Appendix I, *infra*. It should be pointed out, however, that on ~~October~~ July 23, 1940, effective October 1, 1940, the definition quoted above was amended to permit the exemption to be claimed by establishments employing no more than ten employees in the specified operations instead of seven as theretofore (6 F. R. 5165).

[3] A list of the administrative hearings held and findings made on the subject is printed as Appendix II. A copy of each of the transcripts of all such hearings and findings has been deposited in the Supreme Court Library.

The Administrator was not a party to the instant action and neither litigant introduced any part of the hearings in

held that the Administrator could not validly include in his definition a limitation on the number of employees, on the ground that the number of employees in an establishment has no relation to the area of production (R. 226). Applying what it considered the valid portion of the Administrator's definition after "striking down invalid portions" (R. 228), the court reversed the conclusion of the district court that all the fruit canned by respondent did not come from the general vicinity of its plant (R. 227) and held that respondent's employees were exempt from the Act.

SUMMARY OF ARGUMENT

Section 13 (a) (10) of the Fair Labor Standards Act exempts from both the wage and hour provisions "any individual employed within the area of production (as defined by the Administrator)" in certain specified occupations. The Administrator's current definition of "area of production" covers those establishments employing less than seven persons which are located "in the general vicinity" of the farms from which they draw farm-

---

evidence. In *Fleming* v. *Farmers Peanut Co.*, 128 F. (2d) 404 (C. C. A. 5), in which the Administrator was plaintiff, the Government introduced a comprehensive affidavit reviewing the problems inherent in the task of defining the term "area of production" and the considerations which the Administrator weighed (tr. No. 9899, pp. 247–263). The circuit court of appeals, however, did not mention this evidence in its opinion holding the Administrator's definition invalid.

products. The court below held this definition invalid because it includes a nongeographical criterion with the test of region or space. We submit (A) that contrary to the interpretation adopted by the court below, Section 13 (a) (10) does not forbid the Administrator to combine with a test of region or space a limitation on size; and (B) that the factors on which the definition was based show that it was a reasonable exercise of the discretion granted by the Act.

A. The words "area of production" do not refer to territories or regions alone so clearly as to forbid recourse to other indicia of the legislative intent. It is proper to say that when fruits or vegetables are canned in a factory employing 200 persons, they have moved from the area of farm production into the industrial realm. But even if the phrase "area of production" would not ordinarily be said to suggest a definition embracing function as well as space, nevertheless the Court in construing this Act should examine all relevant materials to ascertain its meaning here. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542–544. Those materials show that in Section 13 (a) (10) the term was not intended to forbid such a definition.

When the phrase "area of production" was inserted in the Black-Connery bill, it was probably known to Congress that previously, during dis-

putes concerning the coverage of certain N. R. A. codes, the term had been used in the so-called Wolman definition in an effort to draw the line between farm labor and industrial labor; farm labor was labor employed "within the area of production"; industrial labor was not. Congress must also have known that the controversy was not ended by promulgation of the Wolman definition which confined agricultural labor to employment in certain activities "within the area of production". Immediately, the precise issue involved in the instant case was raised—whether workers in factories which were located in a farming region but which employed so many persons as to be truly industrial, were employed outside the area of production because the size reflected the nature of the work, or within it because the test was one of location alone.

The debates on the Black-Connery bill raised this same problem of drawing a line between agricultural workers on the one hand (who were to be excluded from the Act) and industrial laborers on the other hand (who would receive its benefits). Again, the phrase "employed within the area of production" was proposed as one criterion. Again, it resulted in questions as to what the phrase meant, in the course of which it was asked whether employees in a large industrial establishment located in a farming area were employed in the area of production and therefore to be

exempted from the Act. There was no agreement on the answer. The chief sponsor of the provision stated on the floor that the answer was something to be worked out.

Conscious of the problem, including the precise issue here involved, Congress provided a method for working it out. The Conference Committee inserted after "within the area of production," the words "as defined by the Administrator." Thus, Congress directed the Administrator to determine what was the area of production. It empowered him to decide the questions unresolved in Congress, not because the policies were not clear but because it was necessary to work out administratively their practical application. One such question, expressly mentioned on the floor, would be whether large factories in rural areas are included "within the area of production." The fundamental problem would be to draw the line between industry and agriculture, and plainly in this task considerations of space might not be the only ones that were relevant. We conclude, therefore, that the Administrator was delegated both a broad authority to give the uncertain phrase meaning by application to concrete situations (cf. *Gray* v. *Powell,* 314 U. S. 402) and, more particularly, the power to decide in the light of the purposes of the Act whether to exempt establishments which are located in farming areas, but which are essentially industrial because of their size and position in the trade.

The nature of the problem of defining the area of production also shows that Congress did not intend absolutely to forbid the Administrator to couple a space limitation with other qualifications. It would hardly be possible on the basis of geography alone to draw the line fairly between farm and industrial labor in such a way as to protect farmers and "little farm factories" without needlessly excluding industrial employees from the operation of the broad policy to eliminate substandard wages as rapidly as possible. No purely spatial test would prevent the economic dislocations and unfair competitive advantages which any reasonable definition would have to avoid. Yet Congress laid those duties on the Administrator. It must therefore be taken to have given him power to perform them.

B. Once it is established that the power delegated to the Administrator under Section 13 (a) (10) is not limited to drawing lines on a map or fixing mileage limits, then it can scarcely be argued that the current definition is invalid. The definition is fair, reasonable, and adapted to the statutory ends. This is shown by both the history of the definition and the evidence on which it was based.

Although the court below stated the principle that it should not attempt to legislate or to construct its own definition of "area of production,"

it did in fact apply its own definition in extending the exemption to respondent. The "general vicinity" provision of the Administrator's definition, standing alone, would have an effect altogether different from that sought by the Administrator's definition as a whole. That the Administrator would not have adopted "general vicinity" as the sole requirement of his definition, had he considered the numerical limitation unauthorized, is evident from the administrative hearings prior to its promulgation.

To extend the exemption to respondent in effect involved the exercise of a legislative function which Congress did not confer upon the courts. Assuming the invalidity of the Administrator's definition, there appear only two courses of judicial action available: (1) to extend the exemption to everyone engaged in the operations enumerated in Section 13 (a) (10); or (2) to deny the exemption, at least to those who were not within the terms of the old definition, until the Administrator adopts a valid definition. The first alternative would plainly be at variance with the intent of Congress to limit the exemption and with the well-established principle that exemption from remedial legislation should be strictly construed. The second alternative seems to be the only logical and practicable one. The exemptions should not be extended to respondent, and its employees thereby deprived of the benefits of the

Act, unless it can be said that respondent would be exempt under any conceivable valid definition, which is plainly not true.

ARGUMENT

I

THE ADMINISTRATOR'S CURRENT DEFINITION OF "AREA OF PRODUCTION" IS A VALID EXERCISE OF THE POWER TO DEFINE GRANTED IN SECTION 13 (a) (10)

The Administrator's current definition of "area of production" covers those establishments employing less than seven employees which are located in the general vicinity of the farms from which they draw farm products. The definition was issued upon detailed evidence after long hearings at which all interested persons were given opportunity to be heard. It established a primary test in terms of geography or space (*i. e.*, general vicinity) and supplemented this with a related limitation on the size of the establishments (*i. e.*, employing less than seven persons) in order better to achieve the Congressional purpose and to avoid the competitive inequalities and other economic dislocations which the hearings had demonstrated would follow from a definition in terms of space alone.

The court below invalidated this definition. It held that the term "area of production" refers to "a surface, a territory, a region" and that the power which the statute grants to define "the area of production" does not include the authority to

exclude large establishments which could meet a regional test (see *Fleming* v. *Farmers Peanut Co.*, 128 F. (2d) 404 (C. C. A. 5) on authority of which the instant case was decided (R. 227)). The court below did not have before it the evidence before the Administrator.

The issue on which the validity of the current definition chiefly depends, therefore, is whether the Act, which admittedly vests the Administrator with the power to define the area of production, at the same time forbids him to add to a geographical test a related qualification limiting the size of the establishments exempted.[4] If this question is answered ~~affirmatively~~ negatively, an additional issue is whether the current definition is a reasonable exercise of the delegated power.

On the first point we submit that Congress did not limit the power of the Administrator so nar-

[4] Judge Waller, in his concurring opinion, expressed the view that the Administrator might take various nongeographical factors into account. Judge Waller said (R. 230–231): "Some of the factors that he [the Administrator] might reasonably take into consideration are: (a) availability of other canning plants; (b) freedom of access by good roads; (c) the capacity of the canning plant to handle the produce; (d) the efficiency of the plant; (e) the quantity of produce raised in the area in relation to plant capacity; (g) and in the case of a cooperative cannery (as in the present case) the location of the members of the cooperative." Although Judge Waller apparently believed that the number of employees was irrelevant, it is difficult to understand his position because the number of employees at a plant normally bears a direct relationship to its capacity, which he expressly stated was relevant.

rowly as to forbid him to add other reasonable criteria to a space definition of "area of production" when their use is necessary to achieve the purposes of the Act. On the second point we show that the procedure followed by the Administrator in promulgating it was calculated to achieve a just definition and that the evidence before him clearly establishes that his "choice among possible alternative standards adapted to the statutory end is one which a rational person could have made" (*Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 233).

A. SECTION 13 (a) (10) DELEGATES TO THE ADMINISTRATOR POWER IN DEFINING "AREA OF PRODUCTION" TO COUNT AS RELEVANT OTHER FACTORS THAN THOSE THAT CAN BE EXPRESSED IN TERMS OF SPACE ALONE

1. *The term "area of production" does not refer to a region or territory alone so clearly as to forbid recourse to other material evidence to ascertain the legislative meaning.*

"Area of production" is not a term of art having a fixed meaning. Ordinarily, it may connote a region, a physical space, something that can be marked on a map. But even in ordinary usage that is not the only meaning. One speaks of the "area of discourse" or "the area of debate" and it is certainly proper to say, regardless of location, that farm products being canned in a factory employing 200 persons have moved from the area of production into the industrial sphere. Thus,

the historian of the N. R. A. Code of Fair Competition for the Refrigerated Warehousing Industry wrote in 1936 (H. A. Chastka, *History of the Code of Fair Certification for the Refrigerated Warehousing Industry*, N. R. A. files, March 1936, p. 15):

> The fact that a warehouse is constructed for the purpose of preserving perishable commodities by artificial cooling and the fact that the growers bring these commodities the refrigerated warehouse for preservation should necessarily mean that this fruit has been removed from the area of production * * *.

The court below erred, therefore, in holding that the term "area of production" in Section 13 (a) (10) on its face can refer only to a region or territory and thus manifests an intent to confine the Administrator to geographical considerations to the exclusion of all other factors. On the contrary, the term may be correctly used either to describe a territory or region or else to suggest all the factors of geography, economic function and competitive position that divide the agricultural from the industrial realm. And certainly as a matter of usage it does not reveal an intent to exclude those factors. We must look, therefore, to the background of the term, to its legislative history and to the basic policies of the Act to ascertain the meaning.

But even if the usage were not ambiguous, it would be proper to go behind the words. This Court held in *United States* v. *Dickerson*, 310 U. S. 554, 562:

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant.

See also *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 542–544; *Holy Trinity Church* v. *United States*, 143 U. S. 457.

2. *The legislative history shows that Congress used "area of production in Section 13 (a) (10), as it had been used under the N. R. A. codes, to draw the line between agricultural and industrial workers, a task involving use of other criteria as well as geographic tests, and that Congress deliberately inserted the words "as defined by the Administrator" to empower the Administrator to draw that line and resolve such issues as whether employees in large canning factories should be exempt as agricultural workers solely because of location.*

The Black-Connery bill did not use "area production" either in the original bill (S. 2475, 75th

Cong., 1st sess.) or in the bill reported by the Senate Committee (S. Rept. 884, 75th Cong., 1st sess.).[8] The term was first used in an amendment suggested by the International Apple Growers As-

---

[8] The legislative history of Section 13 (a) (10) is set forth fully in Appendix III, pp. 76–128, *infra*.

The phrase "area of production (as defined by the Administrator)" also appears in Section 7 (c) in a provision granting an exemption from the hours but not the minimum wage provisions of the Act, for a period of not more than 14 workweeks during seasonal operations in each calendar year, to employees of an employer "engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables or in the first processing within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity * * *." The legislative history of this provision, however, sheds no light on the meaning of "area of production." The provision was introduced into the bill by Mrs. Norton, Chairman of the House Committee on Labor, in an effort to draw support away from broader amendments, such as the Biermann amendment which became Section 13 (a) (10), granting exemptions from both the wage and hour provisions. 83 Cong. Rec. 7401, 7419. The proposed amendment was adopted on the floor without discussion of the meaning of the term "area of production." 83 Cong. Rec. 7419–7423. The additional words "as defined by the Administrator" were inserted by the Conference Committee at the same time that the same words were inserted in Section 13 (a) (10). See pages 29–30, *infra*.

Another proposed amendment using a term somewhat like "area of production" was the Borah amendment which exempted from the maximum hour provisions of the bill "employees employed in a plant located in dairy production areas * * *." This amendment was adopted without debate (81 Cong. Rec. 7947) but was stricken in the House (82 Cong. Rec. 1802–1803).

The other significant amendments are discussed in the text.

sociation in a telegram read on the floor by Senator Copeland of New York; the proposed amendment would have changed the bill's definition of agriculture to cover work in connection with packing, storing, transporting and marketing fresh fruits and vegetables in their raw or natural state "within the area of production" (81 Cong. Rec. 7656). Senator Copeland explained (*ibid.*):

> The amendment would then make paragraph 7 [containing the definition of agriculture] the same in principle as recognized by N. R. A. and A. A. A. and under which the fresh fruit and vegetable industry operated. * * * There is a well-established precedent for this under the carefully considered position taken by the N. R. A. and A. A. A.

The proposed amendment was not adopted at that time but shortly thereafter Senator Schwellenbach proposed, and the Senate adopted, a similar amendment containing the phrase "area of production." It added to the definition of agricultural workers the following paragraph (81 Cong. Rec. 7876):

> The term "person employed in agriculture," as used in this act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state.

Contrary to one view taken under the N. R. A. and to opinions later expressed in the House, Senator Schwellenbach stated, in answer to a question, that a large packing plant in apple territory would be exempt under his amendment. This explanation, however, is not entitled to very great weight in considering Section 13 (a) (10) since at that time the amendment was limited to "fresh fruits and vegetables in their raw or natural state" and the Senator expected the limitation to deprive "any large or enormous plants" of the exemption. 81 Cong. Rec. 7876–7877.

Unfortunately, the term "employed within the area of production" did not have any such "established" meaning as Senator Copeland believed. The term "area of production" was used under the N. R. A. in a definition of agricultural labor drawn up by Dr. Leo Wolman, Chairman of the N. R. A. Labor Advisory Board, and agreed to by the officials of N. R. A. and A. A. A. The definition was prepared in an effort to settle a controversy as to whether laborers in citrus fruit packing plants were agricultural workers and thus not subject to labor codes under N. I. R. A.* The definition provided (N. R. A. Release No. 401, August 19, 1933, quoted in *Work Materials,*

* See letter of C. O. Miles of the National Citrus Committee to N. R. A. dated January 8, 1935; Borden, *History of the Labor Provisions, Code of Fair Competition for the Fresh Fruit and Vegetable Distributive Industry*, Part 2, Exhibit A, N. R. A. Files.

No. 45, Part A, National Recovery Administration Division of Review, March 1936, p. 17):

> Agricultural workers are all those employed by farmers on the farm when they are engaged in growing and preparing for sale the products of the soil and/or livestock; also, all labor used in growing and preparing perishable agricultural commodities for market in original perishable fresh form. When workers are employed in processing farm products or preparing them for market, *beyond the stage customarily performed within the area of production,* such workers are not to be deemed agricultural workers. [Emphasis supplied.]

This definition did not end the citrus dispute because the vagueness of the term "area of production" left it open to the operators to contend that since their plants were customarily located in the citrus growing regions, their employees were agricultural workers and therefore exempt. But although there was never agreement as to which application of the definition was correct, it is significant that subsequently an interdepartmental committee representing the N. R. A., the Department of Labor, the Department of Agriculture and the National Labor Relations Board found that citrus fruit packing house employees were "distinctly industrial labor."[7] This committee, it is true, was not confined to applying the

[7] *Work Materials, op. cit., supra,* Appendix B.

Wolman definition, but the decision is nevertheless significant because the purpose of the term "within the area of production" as used in the N. R. A. definition and in the Fair Labor Standards Act was to aid in distinguishing between farm and industrial labor.

The Wolman definition was a source of endless controversy between N. R. A. and A. A. A. and evidently became the subject of considerable attention.[8] In the dispute the A. A. A. took the position which respondent is urging; the N. R. A. denied it. It is enough to give one example. A. A. A. espoused the view that the definition covered employees in large packing or storage establishments because they were located in farming regions.[9] N. R. A. urged the opposite result; its official historian of the refrigerated warehousing code recorded in 1936 (Chastka, *loc. cit. supra*, p. 15):

> It is hardly conceivable that the last sentence of the above definition [Wolman definition] could be construed as meaning a refrigerated warehouse whose employees are strictly industrial as being within the "area of production," since this would mean intolerable confusion from the labor standpoint. * * *

---

[8] *Id.*, Part A at 1, 18, 19, 21; History of the Labor Provisions, etc., *cit. supra*, n. 6, pp. 4, 106, 108, Part II, Exhibit G.

[9] History of the Labor Provisions, etc., *cit. supra*, n. 6, p. 106.

> The fact that a warehouse is constructed for the purpose of preserving perishable commodities by artificial cooling and the fact that the growers bring these commodities to the refrigerated warehouse for preservation should necessarily mean that this fruit has been removed from the area of production and such labor as is required after the commodity has reached the warehouse should not be agricultural.

When the codes were invalidated, the dispute had not been resolved.

The controversy concerning the Wolman definition must have been known to many Senators. Consequently, in spite of Senator Copeland's statement and Senator Schwellenbach's interpretation, a number of them must have realized that since N. R. A. had sought to give a meaning to "area of production" which excluded the large industrial establishments, the term would be open to that interpretation under the Fair Labor Standards Act. This is highly important. We do not contend that "area of production" was used in Section 13 (a) (10) in the sense in which N. R. A. interpreted it. We urge only that the Senate probably knew that the N. R. A. and A. A. A. had given the phrase different meanings and (as we shall show) that both the Senate and the House certainly recognized that the phrase was open to these different interpretations. This is enough to sustain the Administrator's current definition

for it demonstrates that when Congress subsequently inserted words giving the Administrator power to define "the area of production," it intended him to choose among conflicting views.

It is also significant that under N. R. A. and in the Schwellenbach amendment, the term "area of production" was used in connection with packing and storing to separate farm from industrial labor. The fundamental task assigned to the Administrator was to make this differentiation and the use of nongeographical criteria so plainly might be necessary in performing the duty that the power to consider them must be implied.

When the Senate bill was first reported by the House Committee on Labor, the provisions of the Schwellenbach amendment to the definition of agriculture were retained. H. Rept. 1452, 75th Cong., 1st sess. On the floor, however, the Lucas amendment was adopted broadening the definition to make it applicable to all "agricultural commodities" instead of "fresh fruits and vegetables" alone (82 Cong. Rec. 1783–1784).[10] The debate at

[10] As amended the definition read:

"The term 'person employed in agriculture' as used in this Act shall include persons employed within the area of production engaged in preparing, packing or storing agricultural commodities in their raw or natural state and shall include persons employed by any cooperative association as defined in Section 15, as amended, of the Agricultural Marketing Act, if such cooperative association is engaged in preparing, packing, or storing agricultural commodities in their raw or natural state."

that time throws little meaning on "area of production" except that it did not include urban centers (82 Cong. Rec. 1783–1784). Upon recommitment to the Committee on Labor the definition was narrowed somewhat. The bill reported on April 21 provided in Section 3 (g) (H. Rept. 2182, 75th Cong., 1st sess.):

> "Employee employed in agriculture" includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market.

On May 23 and 24, 1938, Congressman Biermann proposed an amendment to Section 3 (g) which read (83 Cong. Rec. 7401):

> "Employees engaged in agriculture" includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter.

This amendment was adopted by the House (83 Cong. Rec. 7407–7408) and in conference became the basis for Section 13 (a) (10) of the Act. In considering its history, therefore, we are considering the history of Section 13 (a) (10).

The debate in the House on the Biermann amendment reflects the same two significant facts concerning the use of the term "area of production" that we have pointed out in connection with the Senate discussions of the Schwellenbach amendment. The first is that the term was used for distinguishing between agricultural workers and industrial employees. This had been made clear in the Senate by the reference to the N. R. A. precedent, and by a statement of Senator Schwellenbach in which he said (81 Cong. Rec. 7876):

> So far as I am concerned, I think there should be a regulation of hours and wages for all workers in the country; but the bill does not attempt to do that. The bill attempts to exempt agricultural workers. The situation in which I am principally interested * * * is one in which, unless an exemption of this kind is made, there will be a discrimination against the small producer and in favor of the larger producer. * * * It is not possible on the small ranch to supply the space for packing the apples. Therefore it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

In the House also the phrase "employed within the area of production" was used in distinguishing

between farm and industrial labor. It was inserted into the definition of agricultural employees. The statements of its sponsors show that they were concerned with exempting agricultural labor (83 Cong. Rec. 7401):

> Mr. WHITTINGTON. * * * As I understand the gentleman's amendment, it is merely a clarification of the definition of the word "employee" under the terms of the Act?
>
> Mr. BIERMANN. And it is the kind of clarification the farm organizations want. The question to be decided in voting on this amendment is whether or not the farmers of the United States are going to have *their definition of "employee" as applied to agriculture* or whether it is going to be written by people who have a city viewpoint. I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding big factories in Jersey City, New York City, and some of the other large cities, by the same token we who come from the farm areas are best qualified to say what terms should apply to labor in those areas. [Emphasis supplied.]

The fact that employment within the area of production was consistently used or proposed as a test for separating agricultural from industrial workers strongly supports our conclusion as to the extent of the Administrator's power. It shows that basic problem underlying Section 13

(a) (10) was the necessity for making that differentiation. To do it fairly, without either injuring farmers or unnecessarily denying truly industrial workers protection against substandard wages, it would be proper to use other criteria than the location of the plants. The difference between agriculture and industry is not one of geography alone. Small packing sheds serving farms too small to have such facilities may be located in industrial regions. Large factories employing skilled laborers under industrial conditions may be located in producing territory. Indeed, in the N. R. A. Code for the Canning Industry (Code No. 446, Art. II, Sec. (1) (n)), employees in plants like respondent's were not regarded as agricultural workers and were entitled to the benefits of the labor provisions. The extent of the power to define which Section 13 (a) (10) vests in the Administrator must be determined in the light of the basic problem requiring his decision. So viewed, Section 13 (a) (10) cannot properly be said to confine the Administrator to questions of distance and region.

Second, the House debates clearly revealed an appreciation that the meaning of "area of production" was uncertain and would have to be worked out in the application of the Act. The declared purposes were not to increase the cost to the farmer,[11] not to interfere with the hours and

[11] For example, Congressman Biermann explained: "* * * The amendment I have offered includes only the

wages of employees in "little farm factories",[12] and to exempt employees in rural areas not working under truly industrial conditions;[13] but beyond that the sponsors of the amendment planned to leave to the processes of administration the problem of drawing the line between agricultural and industrial labor to achieve these purposes. Congressman Biermann who sponsored the amendment and whose words are therefore entitled to particular weight[13a] explicitly stated that the specific question here raised—whether the exemption applies to employees in a large factory located in the region in which its supply of farm products

---

first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing. Those of us who come from dairy sections know that the cost of making butterfat into butter or milk into cheese is borne by the farmer. There is no contention about that, no argument. The Members from the South will agree that the man who raises the cotton pays for ginning the cotton. When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases the farmer gets just so much less; and our contention and the contention of the farm organizations is that this bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country."

[12] E. g. "* * * We should not disrupt these *little businesses*, which are handling farm products directly from the farm and which are supplying good jobs to satisfied employees. * * * The bill is framed with big factory conditions in mind. Why include *little farm factories* where labor conditions are good? * * *" (83 Cong. Rec. 7326; italics supplied).

[13] E. g. 83 Cong. Rec. 7326, 7401, 7405.

[13a] *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536; *Wright* v. *Vinton Branch*, 300 U. S. 440, 463–464.

is grown—would have to be determined in the administration of the Act. The following colloquy occurred on the floor (83 Cong. Rec. 7401–7402):

> Mr. THOMPSON. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production which employs two or three hundred men?
>
> Mr. BIERMANN. Speaking frankly, I think that is something that would have to be worked out.[14]
>
> * * * * *
>
> Mr. CRAWFORD. Does the gentleman's amendment exempt manufacturers of sugar beets in the rural areas?

[14] Later Congressman Thompson announced that he would vote against the proposal—presumably either because at that time no provision for working out the problem had been made or else because he feared it would not be worked out satisfactorily (83 Cong. Rec. 7406). Similar concern had been expressed by a number of Senators in discussing the Schwellenbach proposal. See, for example, Senator Reynolds' comments (81 Cong. Rec., July 30, 1937, at 7877; and comments of Senator Connally (*ibid.*).

In respondent's brief in opposition to certiorari (pp. 24–25), it is contended that significance should be attached to the congressional rejection of two amendments offered by Senator Reynolds making the whole Act inapplicable to employers having ten or less, or five or less, employees, respectively (81 Cong. Rec., July 30, 1937, at 7887–7888; 81 Cong. Rec., July 31, 1937, at 7948). These rejected amendments, however, proposed a flat exemption for *all* employers with less than the prescribed number of employees, and were not related to the "area of production" problem.

565250—44——3

Mr. BIERMANN. That is something that *the Secretary* will have to determine. [Emphasis supplied.]

When the bill went to Conference, the Biermann amendment was removed from the definition of agriculture and made the basis of the exemption now contained in Section 13 (a) (10). It was changed in two respects. The first change is unimportant here; it added to the "handling, packing," *et cetera* the words "preparing in their raw or natural state" and to "in making cheese and butter" the words "or other dairy products." The second change is of decisive importance in the instant case; the Conference Committee inserted after the vague words "employed within the area of production," the phrase "as defined by the Administrator." The change was accepted by both Houses when the bill was passed. We submit that this insertion shows beyond doubt that Congress intended the Administrator to have power to answer the question which Congressman Biermann said would have "to be worked out."

Taken as a whole the history of "area of production" shows that Congress intended to delegate to the Administrator not only a broad power to give the general phrase meaning by applying it to concrete facts but also the specific power to decide in the light of the purposes and policies of the Act whether to exempt establishments which are located in farming areas but which are essentially industrial because of their size or position in

the trade. Under the N. R. A. the meaning of "employed within the area of production" was a constant source of dispute and under one interpretation employees in large plants were regarded as outside that sphere regardless of their physical location. Although there is no evidence, it seems likely that many Senators must have known this history when they voted on the Schwellenbach amendment. In the House, the vagueness of the term was pointed out and the sponsor of the amendment containing it expressly stated that whether it applied to large establishments would have to be "worked out." Thereupon, the Conference Committee gave the Administrator power to define the "area of production." The only conclusion consistent with these facts would seem to be that Congress intended him to answer the unresolved questions by his definitions.

3. *The impossibility of drawing a purely geographical demarcation of the "area of production" without causing economic dislocations and unfair competitive conditions shows that Congress cannot have intended to confine the Administrator's authority to define to a power to demarcate geographical regions.*

It is only reasonable to assume that discretion delegated to the Administrator to define "the area of production" is to be exercised in the light of the policy of the statute as a whole, and particularly in the light of the basic policies enunciated in Section 2. Section 2 (a) shows that perhaps the most important single objective of the

Act was to eliminate unfair competition based upon payment of subminimum wages. As this Court pointed out in the *American Trucking Associations* case, "Upon the proper adjustment of these factors [employees' qualifications and working standards] within an industry and in relation to competitive activities may well depend the economic success of the enterprises affected * * *." 310 U. S. at 542. Section 8 shows that Congress was fully aware of the necessity of taking into account "economic and competitive conditions," of avoiding substantial curtailment of employment, and of "competitive conditions as affected by transportation, living, and production costs." See *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126. Surely the Administrator was not expected to adopt a definition of "area of production" without regard to these factors simply because Congress did not give an "itemized catalogue" in Section 13 (a) (10) itself. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219. When Section 13 (a) (10) is considered in its context in the statute, it is plain that an Administrator would be derelict in his duty if he undertook to define "area of production" heedless of the economic dislocations and unfair competitive conditions that an ill-conceived definition might foster.

But if Congress intended the Administrator to avoid economic dislocations and unfair competi-

tive conditions, it must also have intended to give him power to frame his definition in appropriate terms. Hence, in determining whether Congress intended by the words "area of production" to limit the Administrator under Section 13 (a) (10) to geographical definitions, it is material to inquire whether such definitions would accomplish the complicated task.

The record on which the Administrator's current definition was made establishes beyond doubt that no purely geographical definition could be conformed to the legislative policies at stake. For Congress to have limited the Administrator to mapping regional lines or fixing distances that commodities might move before they would be deemed to have left the area of production, would have been to render it impossible to avoid unwarranted disturbance of competitive conditions and resulting hardship to part of the trade. We shall point out immediately below the evidence proving this to be true, for although Congress of course was not fully familiar with the details of the conditions revealed in the evidence before the Administrator, it may be assumed to have had a general understanding of them. It follows that Section 13 (a) (10) cannot have been intended to confine the Administrator's discretion within such narrow limits as the court below held, but should be construed to allow him to establish additional criteria such as that of the size, and therefore of

the character, of establishments whose employees should be exempt.

Mapping geographical areas.—One approach to a definition of "area of production" based on purely geographic concepts is to map out for each commodity the areas in which the commodities are produced. The test seems simple and obvious because it is our habit to speak of the corn belt, the cotton belt, the apple States, the citrus areas, *et cetera*. Actually, the apparent simplicity is deceptive. There are more than 300 different "agricultural or horticultural commodities" grown in all parts of the country,[15] with no generally accepted concept of what constitutes "the area of production" for any one of the commodities. The production of most of them is widely dispersed. Some parts of the country specialize in particular kinds of commodities, while in other parts of the country diversified farming is practiced. Some commodities, such as poultry, eggs, milk, and many varieties of vegetables, for example, are produced in virtually every county in the country, as shown on the maps printed as Appendix IV. Their production is often most concentrated in industrial regions. In short,

[15] The United States Census lists more than 300 different agricultural and horticultural commodities which are produced in the United States. Farm and Ranch Schedules, U. S. Census of Agriculture, taken by the Bureau of Census, U. S. Department of Commerce, *Sixteenth Census of the United States:* 1940.

agricultural producing regions are not clearly segregated or delineated.[16]

As a result, the territorial definition of producing areas would wholly fail to achieve the objectives sought by Congress, even if it were possible to map them.[17] If one turns to the map on eggs, for example, one notes that the heaviest areas of egg production are located in metropolitan regions such as Boston, Philadelphia, Los Angeles, Buffalo, Seattle, and numerous other cities. One could hardly map out the producing areas of eggs without including most if not all of these large cities in which are located many industrial establishments that Congress clearly did not intend to exempt. At the same time, a mapping of the concentrated areas of production would deny the exemption to many small rural establishments in areas in which diversified agriculture is practiced, or in which the production of certain commodities is not concentrated, as throughout the South, for example, to continue the egg illustration. One would thus be faced with the anomaly of exempting large, urban, industrialized establishments and denying the exemption to many small rural establishments.

---

[16] And after the 1940 hearings the Presiding Officer found "That large quantities of fresh fruits and vegetables are packed or canned in regions or localities which are not defined or definable as producing areas." (Release G–60, p. 12.)

[17] See also pp. 49–51, *infra*, where the administrative complexities are discussed.

If, on the other hand, the mapping program were extended to include the areas of relatively scattered production, it would, in effect, exempt all the establishments in the industry.

Reference to the maps contained in the appendix makes it perfectly evident that this dilemma involved in the mapping approach is involved in practically all commodities. The mapping approach is thus thoroughly unsound from both a substantive as well as an administrative standpoint.

Flat mileage basis.—Under this test, an establishment would be within the "area of production" if all the commodities that it handled were produced within a specified distance from the establishment. The criterion has the apparent advantage of definiteness and certainty and, when used in conjunction with a population test to insure that the operation does not take place in a metropolitan area, was believed at one time to effectuate the general congressional purposes in most cases (see pp. 69–72, *infra*). Such a definition actually issued and was applicable during part of the period involved in the instant case but it was subsequently abandoned because of the serious unfair discrimination it was found to have caused in many cases between firms outside the area and their competitors within it.

The discrimination created by any mileage definition gives indefensible competitive advantages to some firms at the expense of others not so fortu-

nately situated."[18] Moreover, one consequence of such discrimination is the strong stimulus to readjust sources of supply in order to be eligible for the exemption, with the result, in many cases, that farmers may be denied normal outlets for their products, and the orderly and fair marketing of goods in commerce may be interfered with and

---

[18] The Presiding Officer found that "much evidence was offered to show, and it clearly established, that the 'area of production' as defined in this section, results in competitive discrimination in favor of those employers within and against those outside the 'area of production' as defined. This evidence was consistently repeated at each hearing and by practically all witnesses who appeared in behalf of operators in all localities" (Release G–60, p. 2). He also found: "That many plants which normally obtain fresh fruits and vegetables from distances greater than ten miles are entirely comparable to and competitive with plants that fall within the ten-mile limitation in the present definition; and that any mileage limitation, except one so large as to exempt all plants no matter what the source of their raw materials, would necessarily create a similar discriminatory situation" (Release G–60, p. 12).

R. G. Phillips, representing the International Apple Association, National League of Fresh Fruit and Vegetable Distributors, and United Fresh Fruit and Vegetable Association, stated that "establishing an area of production based on the number of miles from the packing and storage plants would be improper, illogical, unnecessary, and would not meet conditions and developments that actually existed * * *" (Supplemental Brief, Jan. 26, 1939, p. 17).

C. B. Moore, representing the Western Growers Protective Association, "the largest unit group of any perishable producing group in the country" (Hearings Jan. 9–12, 1939, reference no. 54, p. 88), asserted that "you cannot limit it [producing territory] by miles in the industry that I represent" (*id.*, pp. 125, 126).

disrupted (see Section 2 (a) of the Act). A flat mileage test alone would have the additional fault that it would permit the exemption in the case of big establishments located in large cities; in many cases, such establishments draw their supplies from distances no greater than establishments in rural areas.

The "general vicinity" test now in effect is a more flexible concept in that it takes into account the various topographical features in different regions and the varying distances encountered in marketing the variety of products covered by the exemption. However, standing alone it would have many of the serious defects of the flat mileage or mapped region definitions.

In discussing the legislative history of Section 13 (a) (10) we pointed out that "within the area of production" had previously been used under N. R. A. in distinguishing farm from industrial labor and that Congress, conscious of the N. R. A. background, used the term for that purpose in Section 13 (a) (10). Accordingly, it is a fair inference that Congress intended the Administrator in defining "the area of production" to bear in mind that the purpose of his definition is to differentiate agricultural workers from industrial employees entitled to the protection of the Act. (See pp. 16–27, *supra*). The conditions which make it impossible to use the two purely geographical tests without producing economic disturbances and unfairness that Congress wished

to avoid, also make it impossible to separate farm employees from industrial laborers on the basis of location or mileage and population alone. Many small packing sheds serving a few nearby farms that lack such facilities are located in urban centers outside the regions of concentrated production. Large factories are often located in small towns in farming regions; they use highly mechanized equipment operated by hundreds of skilled factory laborers who work and live under industrial and not farm conditions. Indeed, it is not too much to say that within the area affected it would frustrate all the purposes of the Act to construe Section 13 (a) (10) to forbid the Administrator to supplement a space definition by other criteria, such as size, showing the economic and competitive position of the establishment and the industrial or agricultural character of the employment.

This does not mean that the Administrator is free to ignore geography and establish any tests he may choose. A chief connotation of "area of production" is region or distance and doubtless the Administrator should give effect to it, as he did in the definition currently in force. Our contention is simply that the words "employed within the area of production (as defined by the Administrator)" should not be interpreted to exclude from permissible definition the use of nongeographical criteria necessary to accomplish the purposes of the Act.

B. THE CURRENT DEFINITION WAS A REASONABLE CHOICE ADAPTED TO THE STATUTORY END

Once it is established that Section 13 (a) (10) does not arbitrarily confine the Administrator to geographical definitions, it follows without real doubt that the definition now in force is valid. The definition includes within the area of production those plants which are located within the general vicinity of the farms they serve except that it denies the exemption to plants employing more employees than seven because regardless of location they are industrial in character and compete with factories in urban areas. The procedure followed in promulgating the definition and the evidence on which it was based both demonstrate that the combined test of location and size is fair, reasonable, and adapted to the statutory ends.

1. *The proceedings leading to promulgation of the current definition.*

Although the Administrator did not hold hearings before promulgating the original definition,[20]

[20] Because of the shortness of time and his small staff, the Administrator was unable to hold hearings or to make an adequate investigation of the problem in the early months of the Act's operation. However, before the promulgation of the original definition, an economic study was made to investigate the practical effects of a variety of possible definitions and conferences were held with experts attached to the U. S. Department of Agriculture, and with representatives of labor and of a number of the affected industries. See Administrative Procedure in Government Agencies, Part I, pp. 67–68.

extensive hearings and thorough investigations were commenced about two months after the effective date of the Act and on several subsequent occasions. Special hearings were held for particular commodities or groups of commodities.[21] In some cases witnesses were heard and conferences were held in outlying regions easily accessible to certain groups in the industries concerned. Over 200 representatives appeared at the formal hearings, including more than 150 employer representatives, some 14 employee representatives, and a number of members of the Senate and House. Twenty-four volumes of evidence, containing more than 4,000 pages, were taken at the formal hearings alone. In addition, hundreds of exhibits were submitted. Special studies and reports bearing on various aspects of the problem were made by

[21] See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, United States Department of Labor: on fresh fruits and vegetables, reference no. 54, Jan. 9–12, 1939 (4 vols.); no. 73, April 3–4, 1939 (2 vols.); no. 162a, May 1–4, 1940 (4 vols.); no. 162b, May 6–8, 1940 (3 vols.); no. 162c, May 9–11, 1940 (3 vols.); on dry edible beans, Nov. 14–15, 1938 (2 vols.); on tobacco, reference no. 48, Dec. 9–10, 1938 (2 vols.); on poultry, reference no. 58, Feb. 9, 1939 (1 vol.); on seed, reference no. 71, March 27, 1939 (1 vol.); on sugar, reference no. 72, March 29, 1939 (1 vol.). A copy of the transcripts of each of these hearings has been deposited with the Librarian of the Supreme Court Library.

economists and investigators of the Wage and Hour Division of the Department of Labor.[22]

A considerable portion of the hearings related specifically to the application of proposed definitions to the fresh fruits and vegetables industries, which included canning plants like the one involved in the instant case. The first group of these hearings was held on January 9–12, 1939, by a representative of the Administrator.[23] The Administrator, instead of accepting the findings and recommendations of this representative, personally held hearings on the same subject on April 3–4, 1939.[24] Following the latter hearing, the Administrator promulgated an amendment to the regulations setting up a special alternate definition applicable to operations on fresh fruits and vegetables (R. 188). On June 17, 1939, a further gen-

[22] Among these studies and reports were the following: *Report on Proposal to Broaden Wage and Hour Exemptions under the Fair Labor Standards Act by Removing the "Area of Production" Limitation in Section 13 (a) (10)*, March 1940; *Report on the Citrus Fruit Packing Industry under the Fair Labor Standards Act*, April 1940; *Report on the Fruit and Vegetable Canning Industry under the Fair Labor Standards Act*, May 1940; *Tables Relating to the Fresh Fruit and Vegetable Packing Industry in Selected States and for Selected Products*, May 1940. Copies of these studies and reports have been deposited in the Supreme Court Library.

[23] The hearing officer's findings were published by the Division as Press Release R–226, which has been filed with the Librarian.

[24] Reference No. 73, see footnote 21, *supra*.

eral amendment to the regulations became effective (R. 188–189). Following these amendments protests continued in large volume and the United Fresh Fruit and Vegetable Association of Chicago and sundry other parties petitioned for re-examination and amendment of the definition (see Release G–60, p. 1).

Another group of hearings was held in 1940. In the latter part of March and early April, twelve regional hearings were conducted in various sections of Florida, Arkansas, Texas, and on the Pacific coast by regional representatives of the Division, with a view to obtaining data to be used in connection with the national hearings. A series of national hearings was then commenced at Washington. From May 1 to 4, a hearing on the handling, packing, storing, preparing in their raw or natural state (but not canning) of citrus fruits was held. From May 6 through 8, a similar hearing was held with respect to operations on all fresh fruits and vegetables other than citrus. From May 9 through 11, a hearing was held with respect to the drying and canning of fresh fruits and vegetables, including citrus.

By the time these hearings were commenced, the complexity of the problem and the need for careful balancing of conflicting interests had been demonstrated by experience. To insure a fair consideration of all pertinent factors, the presiding officer announced in a press release (Release R–716)

that evidence would be received on all relevant factors, including the following:

(1) Percentage of plants, employees, and of industry pack now exempt from the Act.

(2) Characteristics of the exempt plant as distinguished from the nonexempt plant, i. e., size, location, distance from within which commodities are obtained from farms, and hourly earnings of employees.

(3) Competition between regions and between the exempt and nonexempt plants locally and on national markets.

(4) Ratio of labor costs to total operating costs in both exempt and nonexempt plants.

(5) Changes in costs as a result of the Fair Labor Standards Act and effect of changes in costs on (a) farmers' prices, (b) prices to consumers, (c) consumption of products, and (d) productivity of labor.

(6) Availability of markets to farmers.

(7) Number of workweeks of more than 44, 42, and 40 hours worked during the past three seasons by exempt and nonexempt plants.

(8) Fluctuations in number of employees and volume of fruits handled from week to week during the past three seasons.

(9) Types of occupational skills required in, and available supply of labor for, both exempt and nonexempt plants.[25]

---

[25] The evidence received at these hearings was summarized by the presiding officer in Press Release G–60. Copies of this Release have been deposited in the Supreme Court Library.

It was brought out at the hearings that not only are the packers and canners of the same commodities in competition with each other, but that their products are highly competitive with other canned fruits and vegetables and with fresh, frozen and dried produce.[28] Plants of the same

[28] See, for example, the following pages of the transcript of the Hearings of May 9–11, reference no. 162c, pp. 63, 64, 304–305, 311, 375, 417.

J. A. Burch, representing the South Texas Canners Association, stated: "On citrus products, 50 percent of our production will be marketed in the Atlantic Seaboard states, approximately 35 percent in the Middle West, approximately 10 percent in the Southwest, and approximately 5 percent on the Pacific Coast. There are, of course, some small distributions in all other sections. These citrus products are sold on all markets in which these citrus products are sold, in competition with those from Florida, California, and some from Arizona.

"Our canned vegetables are distributed generally in the southwest territory, which includes the states of Louisiana, Arkansas, Missouri, Oklahoma, Colorado, New Mexico, and Texas, but predominantly in the state of Texas. Canned vegetable products encounter competition from practically all over the United States, in all territories to which they are shipped." (Hearings of May 9–11, 1940, Exhibit S–4, p. 7.)

Stuart Farrar, of the New York State Canners Association, summarized the situation as follows: "In speaking of competition in the canning industry here, I have gathered from previous testimony that they were talking more or less of competition among the canners. We feel in New York State that this competition is from all types of food, one competes with another, regardless of whether it is green produce, frozen produce, or dried produce. Consequently any catastrophe which affects one phase of the industry affects all phases. A freeze in Florida has a definite effect on

size, handling the same types of commodities and subject to substantially the same costs, may be located either in small towns or in comparatively large towns or cities."[27]

A basic consideration in drafting a workable definition, as was generally conceded by industry, labor, and public representatives at the administrative hearings, was the importance of keeping competitive inequalities at a minimum.[28] Also an

---

the canned goods packed in Maine or New York State. Consequently any artificial influence which is established affects the canner and also the green produce man." (Hearings of May 9–11, 1940, reference no. 162c, pp. 325, 326.)

[27] "* * * competition between the city canner and the country canner is so close that if under the Fair Labor Standards Act the country canner were granted exemptions which were denied to his city competitor, it would result in virtual discrimination against the canner in the large city." (C. B. Torsch, representing the Baltimore Canned Foods Exchange, Hearings Jan 9–12, 1939, reference no. 54, p. 891.)

"The size of the community in terms of the population is equally inapplicable because the application of such test would inevitably tend to discriminate against plants in the same type and size located in differing surroundings." (Boris Shishkin, Economist for the American Federation of Labor, Hearings Jan 9–12, 1939, reference no. 54, p. 973.)

[28] The solution proposed by the employer representatives, not unnaturally, was to exempt the specified operations in whole industries, whole States, and even the whole United States. See, for example, in the January 1939 hearings (reference No. 54), pp. 69–70, 177–178, 189–190, 283–284, 427–428, 707, 886. The California Farm Bureau Federation proposed the following definition: "An individual shall be regarded as employed in the area of production within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in the raw or natural state or canning of agricultural or

ill-conceived discriminatory definition might seriously restrict the grower's market in some localities and thus cause economic dislocation for

---

horticultural commodities for market, or in making cheese or butter or other dairy products, (a) if he performs those operations on materials, all of which come from the farms, and (b) if he performs those operations on materials in any of the processes which prepare them for market, distribution or for re-manufacture." (Letter, June 20, 1940, docket 51, case 2.).

Not only is this definition so broad as to exempt all employees engaged in any of the specified operations, but the last part of the definition would exempt considerably more operations than those enumerated in Section 13 (a) (10), since it exempts not only operations "for market" but also those for distribution or remanufacture.

The court below, also, seems to suggest that the only permissible definition is one which would give a blanket exemption to the specified operations (R. 228), although it found it unnecessary to determine the question since it believed, contrary to the District Court's finding (R. 192), that the respondent met the "general vicinity" test. Concurring, Judge Waller stated frankly his opinion that the area of production could mean only "the area within which such fruits and vegetables are customarily, in the usual course of business, brought by the farmer to be marketed or processed," "without regard to the number of employees, without regard to the location of a city, and without regard to any [other] factor" (R. 230). This, of course, would give a blanket exemption to all plants performing the operations enumerated in Section 13 (a) (10).

Employee representatives, on the other hand, urged that the definition be narrowly construed and that large industrial plants not be freed of the requirements of the Act. Cf. Hearings January 9–12, 1939, reference no. 54, p. 973; Hearings May 1–4, 1940, reference no. 162a, p. 522; Hearings May 9–11, 1940, reference no. 162c, p. 390.

farmers as well as for canners and packers.[29] Any reasonable and practicable definition of "area of production" had to be drawn in the light of a careful study and understanding of this background.

On the basis of the hearings and investigations, the Administrator's original definition has been revised a number of times. Since the promulgation of the original definition on October 20, 1938,[30] two basic revisions have been made.[31] Experience or changing conditions may require further amendments in the future, for which appropriate provision is made in the Administrator's regulations.[32] The definition here challenged rep-

---

[29] See, for example, Hearings April 3–4, 1939; reference no. 73, p. 112; Hearings May 6–8, 1940, reference no. 162b, p. 160; Hearings May 9–11, 1940, reference no. 162c, pp. 37, 55, 167, 213, 319.

On the basis of the evidence Presiding Officer Vincent found that "the testimony also indicated that the mileage limitation in the present definition has the effect of limiting the market outlet for the products of some growers who deal or wish to deal with plants located within and outside the 'area.'" (Release G–60, p. 2.)

[30] 3 F. R. 2536 (October 22, 1938).

[31] 4 F. R. 2436 (June 17, 1939) and 6 F. R. 1476 (March 18, 1941). In addition, special definitions relating to particular industries have been promulgated from time to time. 3 F. R. 3072 (December 22, 1938); 4 F. R. 1009 (February 25, 1939); 4 F. R. 1655 (April 20, 1939); 4 F. R. 2436 (June 17, 1939); 5 F. R. 2647 (July 24, 1940); 6 F. R. 5165 (October 11, 1941). The various definitions are printed in Appendix I.

[32] Section 536.3 of the Regulations provides: "Any interested person or association wishing a revision of the forego-

resents an attempt by the Administrator to solve the problem without economic dislocations by striking a balance between the narrow objective of the Section 13 (a) (10) exemption and the broad policies of the Act as expressed in Section 2. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581, 583–584.

2. *The evidence at the hearings shows the current definition to be reasonable.*

In the course of these proceedings many kinds of definitions were proposed, considered, and eliminated as unfair or impracticable or contrary to the policies of the Act. One possibility, already discussed, was the mapping of producing territories. It was rejected for the reasons stated above (see pp. 33–36, *supra*). Moreover, it was unworkable administratively. The enormous administrative burden involved can best be appreciated by reference to the maps in Appendix III, showing the producing regions of a few commodities. To cite

---

ing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will make other provision for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes." (Section 536.3, as amended, approved by the Administrator March 12, 1941; effective April 1, 1941; published in the Federal Register March 18, 1941.)

a single illustration, the egg map shows a very heavy concentration of production beginning in New Hampshire and extending through lower New England, New York, and New Jersey and then swinging through Pennsylvania and across the continent into Iowa and Minnesota, ending in Nebraska and the corner of South Dakota. Additional heavy concentrations are found in California, Oregon, and Washington. The map shows, however, that eggs are produced without exception in every State of the Union. It would be relatively easy, of course, to draw a line around the entire United States and to say that the entire United States is the "area of production" of eggs and do likewise for each of the hundreds of commodities which are referred to by the Section 13 (a) (10) exemption. Such a mapping, however, would make a mockery of the limitation placed by the Congress on the exemption and must be rejected for that reason. The alternative would be to draw maps around many individual producing areas, but it would be an enormous task to determine precisely where each such producing area began and ended. Yet, in order to achieve the necessary definiteness to make the exemption administrable, it would be necessary to draw precise and definite lines around all producing areas in the country. The enormous amount of research involved and the difficulties involved because of the lack of clear segregation between producing

areas are evident even for a single commodity.[33] When it is considered that this task would have to be completed for hundreds of commodities, it can be readily appreciated that an exemption dependent upon the completion of this task would involve years of effort.

A second test proposed was to define the area of production to include all plants drawing farm products from within a definite radius except those located in urban centers. This is the flat mileage-population definition which was in effect for several years. It proved unwarranted for reasons already stated (see pp. 36–38, *supra*). After the hearings the Presiding Officer found that "much evidence was offered to show, and it clearly established, that the 'area of production' as defined in this section, results in competitive discrimination in favor of those employers within and against those outside the 'area of production' as defined. This evidence was consistently repeated at each hearing and by practically all witnesses who appeared in behalf of operators in all localities" (Release G–60, p. 2). See also notes, 18, 27, *supra*.

Another possibility was to consider as falling within the "area of production" plants which

[33] Even for such a relatively localized product as citrus fruit, mapping of the major producing regions in Florida, California, and Texas would exclude the minor areas in Arizona, Louisiana, and Mississippi, as shown in the map in Appendix IV.

were the first concentration points for commodities after leaving the farm. The studies made by the Division indicated that no definition of this character could be applied generally.[34] Some agricultural commodities, such as grains, beans, and milk typically are assembled and first processed in small rural establishments, and then sent to large urban establishments for further handling. Other commodities go direct to establishments ranging from small plants to large urban factories. At times, establishments receive all their commodities directly from farms, and at other times, even in the same season, they receive some or all of their commodities from other points at which they have been assembled.[35] There would, therefore, be consider-

[34] With respect to "dry edible beans" and "Puerto Rican leaf tobacco," this definition has been adopted (R. 190–191). Peculiar conditions, as well as established practices in these industries, made this feasible. Release R–201; Hearings November 14–15, 1938, on dry edible beans (2 vols.); December 9–10, 1938, on Puerto Rican leaf tobacco, reference No. 48 (2 vols.).

[35] In Florida, "the canneries get their supplies from both the groves which are throughout the areas and from the packing houses which are throughout the area" (Hearings January 9–12, 1939, reference no. 54, p. 839). In Texas, the citrus canners "at times buy fruit from the fresh fruit shippers, that is, the grades that are not used to go out in the fresh shipments" (*id.*, at 73). Canners in the Baltimore area draw their raw materials from "commission merchants in the City of Baltimore acting as receivers of the products of growers" as well as from growers (*id.*, at 884). Citrus canneries in California typically "receive the *hulls* [evidently culls] or by-product oranges from the packing house" (*id.*, at 933).

able administrative difficulty in determining whether an employer's establishment is a first concentration point.

Moreover, while this definition does not produce substantial competitive inequalities with respect to the specific commodities for which it has been adopted, if applied generally to the operations described in Section 13 (a) (10) it would be severely discriminatory. Furthermore, the adoption of a first concentration point definition for the canning of these products would probably result in substantial waste of packing house culls which are suitable for canning. For, under such a definition, many canneries would refuse to buy packing house culls in order to secure an exempt status, with the result that substantial amounts of these culls would have to be thrown away. The farmer would be the loser in that he would receive from the packing house a smaller aggregate return for his produce.

Another alternative considered and rejected was to define "area of production" so as to include only establishments which handled and prepared commodities for the account of the farmer, the latter retaining title. Such a definition, however, would have no rational relationship to the purpose of the exemption. Whether commodities are handled on a fee basis for the account of the grower or otherwise depends more upon historical accidents in the local development of marketing methods than upon any other factor. Neither the size of an establish-

ment nor its nearness to sources of supply is correlated to the one practice or the other. Nor is it more likely that an establishment will pass its costs back to the farmer because it follows one practice rather than the other. Numerous industry representatives at the administrative hearings pointed out that a distinction on this basis would be unwarranted and complained that it would cause disrupting discrimination between different regions.[36]

The above discussion gives some idea of the difficulty of the problem of definition. Successive Administrators, after wrestling with the problem have each concluded that a definition expressed solely in geographical terms could not be adapted to the concrete practical needs of the industries involved. They also rejected the other alternatives. In an effort to make a geographical test workable,

---

[36] This basis of definition was strongly opposed by E. G. Grimes, of the Florida Citrus Commission, a State regulatory body. He asserted, with respect to the packing of citrus (April 3, 1939, Hearing, reference no. 73, pp. 77, 78, 80), that Florida had about 40 percent of its fruit handled by cooperatives for the benefit of the grower, the other 60 percent being handled by "independents." In California, however, 95 percent of the fruit is packed by cooperatives, he said.

R. G. Phillips, representing the International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, the United Fresh Fruit and Vegetable Distributors' Association, and several other associations, also strenuously opposed this definition as impracticable, stating it would create "terrific disruption, discrimination, and chaos in the whole market" (Hearing, April 3–4, 1939, reference no. 73, p. 226).

they have coupled a requirement that all commodities be received from the "general vicinity" or "immediate locality" with a coordinate requirement that the establishment shall not employ more than seven employees (R. 187–192). Such a combination affords a practical means of achieving a rough geographical limitation and, at the same time, reduces competitive discrimination to a minimum. Limiting the number of employees automatically confines the exemption geographically, because a small plant can absorb only a limited amount of agricultural commodities and its capacity is normally sufficient only for the products of nearby farms." Thus the limitation on the number of employees is not dissociated from, but rather helps to effectuate, the standard of nearness implicit in the phrase "area of production." Indeed, when the Court compares the great dis-

[37] "The number of employees per plant increased both as the maximum radius of operations of the plants increased and also as the size of the community increased." (*Report on the Fruit and Vegetable Canning Industry under the Fair Labor Standards Act*, May 1940, p. 8, W. H. Exhibit no. 15, Hearings May 9–11, 1940.)

"In general the smaller plants obtain their products from more restricted areas and also tend to be located more often in rural communities or the open country. For example, in Florida, on the basis of the industry questionnaire, 14.2 percent of the citrus packing plants would be exempt because of both being located in rural communities and obtaining all their products from within 10 miles. However, these plants had only 5.8 percent of the total number of employees included in the study." (*Report on the Citrus Fruit Packing Industry under the Fair Labor Standards Act*, April 1940, p. 56, W. H. Exhibit no. 10, May 1–4, 1940, Hearing.)

tances of the Western farmlands with those of the thickly settled Eastern agricultural areas, it seems plain that a limitation phrased in terms of the number of employees serves better than could any measure in terms of miles to extend the exemption to establishments serving the nearby farms and to no others.

The Administrator's definition setting up the "general vicinity-seven employee" standard results generally in little competitive dislocation. Many agricultural commodities are first handled in small establishments located close to the farm, with subsequent handling and preparation occurring in large establishments located in urban communities. Under this marketing system, the small and the large establishments are complementary and not competitive, and an exemption including such a limitation on the number of employees offers very litle interference to the competitive structure of the industry. In other cases, it is true, the initial preparation and handling of the same commodity may occur in plants which vary considerably with respect to the number of employees. But even in this situation there is not likely to be any substantial competitive discrimination. The large plants are normally highly capitalized, well equipped, and expertly managed. These establishments have competitive advantages to compensate for those which the exemption of Section 13 (a) (10) gives to the small plant located near the farm.

It was particularly evident with respect to the packing and canning of fresh fruits and vegetables, that the limitation of the exemption to the very small plants was entirely reasonable. Presiding Officer Vincent, after the May 1940 hearings, found that the competitive packing and canning plants for fresh fruits and vegetables were so distributed among rural regions and large and medium-sized cities, that a definition which made a distinction on the basis of geographical location alone, "would operate to seriously disturb established competitive conditions" and would cause "serious competitive discriminations" (Release G–60, finding 2, p. 12). He found further that, prior to the Act, the areas producing the major part of the volume of fresh fruits and vegetables paid wage rates higher than the minimum-wage rate under Section 6 (*id.*, finding 6, p. 12); and that to make the minimum wage exemption available to plants in the lower wage areas would only serve to exaggerate the wage advantage enjoyed in any event by the plants in the low-wage area.[38] He concluded that such a competitive advantage "*between* producing areas

[38] "* * * even though operators in low-wage areas were placed under the minimum wage set by the Act they would still enjoy a minimum wage advantage over operators in high-wage areas. This would result both because of the considerably higher wages now prevalent in the latter areas, and because a larger proportion of workers in these areas receive more than the 30-cent minimum than is the case in low-wage areas." (Release G–60, p. 9.)

is as prejudicial to fair commerce as discrimination *within* producing areas" (*ibid.*)." The presiding officer also found that the minimum-wage requirements of the Act placed no appreciable economic burden on plants packing and canning fresh fruits and vegetables or upon the farmers producing such commodities because "except for a relatively few areas which produce a minor part of the total volume of fresh fruits and vegetables, application of the minimum wage provided by Section 6 of the Act does not add to or increase the labor cost of packing and canning" such commodities (*id.*, finding 5). There was thus no serious claim that employees in these industries working in the plants not exempted by the Administrator's definition should be deprived of the minimum wage.

There was, however, considerable concern about the overtime requirements of the Act. Section 7 (c), which automatically granted an exemption

---

" The presiding officer's findings summarize the testimony showing extensive competition between regions, pointing out that "Fruits and vegetables, both raw and canned, are sold on a national, and in many instances, an international market. This was testified to by operators in both high-wage areas and low-wage areas" (Release G–60, p. 8). South Texas canners "enter into competition with all other producing sections in the United States"; "the Lower Rio Grande Valley and Coastal Bend section are in direct competition with California and Florida producers"; Virginia potatoes and vegetables compete with products "from California to Maryland"; California citrus competes with Florida and Texas production (*id.*, pp. 8–9).

from the overtime requirements of 14 workweeks per year to the industries in question, was deemed insufficient to offset the increase in costs for overtime since the active seasons for fresh fruits and vegetable canning and packing in many instances exceed 14 weeks, "but rarely more than 27 or 28 weeks" (Release G–60, finding 7, p. 12). The presiding officer therefore concluded that this was a matter to be solved by application for a seasonal exemption from the overtime provisions only, pursuant to Section 7 (b) (3) of the Act, and that there was no practical need for a blanket exemption under Section 13 (a) (10) (*id.*, recommendation 3, p. 13). Accordingly, an additional 14 workweeks' exemption was made available to the fresh fruits and vegetable canning and packing industries by the Administrator's finding of seasonality effective August 24, 1940, and these industries now have approximately seven months' exemption from the overtime requirements.

Indicative of the reasonableness of the present definition is the great reduction in the number of complaints and petitions for redefinition since its effective date. Prior to its adoption, a great many complaints were made and petitions for redefinition were filed during a period of years. Since the effective date of the present definition only occasional complaints are received from isolated plants.

It is not unreasonable to make the application of the exemption depend upon a numerical limitation. Many analogies can be found in legislation where application of the statutory requirements depends upon a numerical or size limitation "apparently arbitrarily fixed." *Booth* v. *Indiana,* 237 U. S. 391, 397; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 510; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152. What is a reasonable basis for classification or definition of terms when legislative action is involved would appear to be equally reasonable where an administrative agency performs quasi-legislative functions under a proper delegation of authority. Cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 83; *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185–186.

II

THE DECISION BELOW INVADES THE PROVINCE OF THE ADMINISTRATOR

This Court repeatedly has recognized that the scope of judicial review of administrative action must of necessity be narrowly confined especially "where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged." *Security Administrator* v. *Quaker*

Oats Co., 318 U. S. 218, 228; *United States* v. *Bush & Co.*, 310 U. S. 371; *Railroad Commission* v. *Rowan & Nichols Oil Co., supra; National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479. And where, as in the instant case, no direct judicial review was provided by Congress, whatever judicial inquiry is made must be made with the greatest restraint. Cf. *Switchmen's Union of North America* v. *National Mediation Board*, No. 48, October Term, 1943, decided November 22, 1943; *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Rd. Co.*, No. 23, October Term, 1943, decided November 22, 1943; *Brotherhood of Locomotive Engineers* v. *Southern Pacific Co.*, Nos. 27 and 41, October Term, 1943, decided November 22, 1943."

[39] As in the case of the certification and designation provisions of the Railway Labor Act, there is no express provision in the Fair Labor Standards Act for judicial review of the Administrator's definition of "area of production." Nor is there any general provision for judicial review of his rule-making powers. On the other hand, Section 10 (a) of the Act expressly provides for judicial review of certain administrative wage orders. Hence, as in the *Switchmen's Union* and *Brotherhood of Locomotive Engineers* cases, *supra*, the inference is strong that other determinations delegated to the Administrator, for which no review was expressly provided, were intended to have "a finality which it [Congress] denied administrative action under the other sections [e. g. 10 (a)] of the Act." *Switchmen's Union* case, *supra*.

The court's inquiry is at an end if there is found a rational relation of the regulation to the statutory authority; the question is whether the particular alternative which the Administrator selected, among many alternatives, to achieve the objectives of the Act is one which, in the circumstances, a rational person could have chosen. Cf. *Final Report of the Attorney General's Committee on Administrative Procedure,* S. Doc. 8, 77th Cong., 1st Sess., pp. 116, 117, 119.

The court below, stating the principle that it "should not attempt either to legislate or to define the area of production" (R. 228), applied its interpretation of the portion of the Administrator's definition which it regarded as valid. But it is plain that in extending the exemption to respondent, the court in fact was applying its own definition. From the administrative hearings and findings, as well as from the terms of the various definitions adopted by the Administrator, it is clear that, had the Administrator considered the numerical limitation unauthorized, he "would not have been satisfied with what remains" (*Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184), and would not have adopted "general vicinity" as the sole requirement of his definition. The "general vicinity" provision, standing alone, would have "an effect altogether different from that sought by the meas-

ure [the Administrator's definition] viewed as a whole" (*Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330, 362). That the Administrator would not have adopted a definition giving such breadth to the exemption is affirmatively evidenced by his rejection of alternative definitions.[40] The court below thus defeated the intent of the Administrator and in effect wrote its own definition.

Even if it be assumed that the Administrator's definition was invalid, we submit that it was error for the court below to extend to respondent an exemption on the basis of the court's own conception of a fair and reasonable definition (*Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 580–581). For this involved the exercise of a legislative function which Congress did not confer upon the courts (cf. *Switchmen's Union* case, *supra*), and which it is doubtful that Congress could have conferred on Federal courts. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 466; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 444. Cf. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage*

[40] See pp. 49–54, *supra*, discussing consequences of alternative definitions. One o the definitions adopted b the Administrator but later abandoned because it was found unsatisfactory provided that an establishment was in the "area of production" if it received products from the immediate locality and was located in the open country or a rural community.

Co., 289 U. S. 266, 275–276. Moreover, for the courts to undertake to grant an exemption to establishments which have not met the requirements of the Administrator's definition is to invite widespread confusion. Varying judicial definitions in different sections of the country would result, causing indefensible discrimination between competitors. The judicial definitions would necessarily be based upon the records in single isolated cases without adequate consideration of the problem as a whole. In addition, employees and employers would not know, until they had litigated, whether they had any rights or liabilities under the Act. This is precisely the confused situation which follows from the decision of the court below.

We believe that, assuming the invalidity of the Administrator's definition, there are only two courses of judicial action available. One is to extend the exemption to everyone engaged in the operations enumerated in Section 13 (a) (10). Such an unlimited exemption, however, would plainly be at variance with the intent of Congress and with the well-established principle that the coverage of "remedial" legislation should be liberally construed and "exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311–312; *McDonald* v. *Thompson*, 305 U. S. 263;

Bowie v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567 (C. C. A. 3), affirmed, 316 U. S. 517; *Knight* v. *Mantel*, 135 F. (2d) 514 (C. C. A. 8).

The other alternative, which seems to be the only logical and practicable consequence of invalidating the Administrator's definition, is to deny the exemption until the Administrator adopts a valid definition.[41] There is certainly no basis for extending the exemption to respondent and depriving its employees of the benefits of the Act, unless it can be said that respondent would be exempt under any conceivable valid definition, which is plainly not true. Whatever equitable disposition the court might feel called upon to make with respect to persons relying upon the Administrator's allegedly invalid definition,[42] no such equitable considerations would entitle respondent here to an exemption at the expense of its employees.

---

[41] This view was taken by the district judge (R. 194) and in *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1006 (S. D. Cal.). It is unnecessary at this time to consider the bearing of a subsequent valid definition on past pay periods. On this point, see *Manhattan Co.* v. *Commissioner*, 297 U. S. 129; *United States* v. *Morgan*, 307 U. S. 183.

[42] Cf. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358; *Warring* v. *Colpoys*, 122 F. (2d) 642 (App. D. C.); certiorari denied, 314 U. S. 678; Securities Exchange Act of 1934, 15 U. S. C., sec. 78w (a); Securities Act of 1933, 15 U. S. C., sec. 77s (a). See *Snyder, Retrospective Operation of Overruling Decisions*, 1940, 35 Ill. Law Review 121.

CONCLUSION

The Administrator's regulations defining "area of production," and particularly the provision limiting the number of employees in the establishment where the exemption might apply, are valid. Furthermore, the court below exceeded the province of judicial review in holding part of the definition invalid and purporting to apply the remainder of the definition, thereby extending the exemption to respondent. The decision below should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor,

ARCHIBALD COX,
Associate Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

JAMES H. SHELTON, JR.,
MILTON DENBO,
Attorneys,
Department of Labor.

JANUARY 1944

APPENDIX I

History of the Several Definitions of Area of Production Under Section 13 (a) (10)

On October 20, 1938, effective October 24, 1938, the Administrator issued the following regulations (3 F. R. 2536):

> Section 536.2 *"Area of Production" as Used in Section 13 (a) (10) of the Fair Labor Standards Act.*—An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products
>
> (a) if he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or
>
> (b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven.
>
> Section 536.3 *Petition for Amendment of Regulations.*—Any interested persons or associations wishing a revision of the foregoing regulations may make application to the Administrator in writing to amend Sec-

tions 536.1 and 536.2 by increasing or decreasing the maximum of employees permitted within the exemption as defined. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will make other provision for affording interested parties an opportunity to present their view either in support of or in opposition to the proposed changes.

Effective December 22, 1938, the Administrator issued an amended regulation adding to section 536.2 an alternate paragraph numbered "(c)" applicable to dry edible beans as follows (3 F. R. 3072):

* * * * *

(c) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (c), "first concentration point" means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points.

On February 25, 1939, the Administrator amended Section 536.2 of the regulations by adding an additional subsection "(d)" applicable to Puerto Rican leaf tobacco as follows (4 F. R. 1009):

* * * * *

(d) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, pack-

ing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (d), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

Effective April 20, 1939, the Administrator amended section 536.2 of the regulations by adding an additional paragraph "(e)" applicable to perishable and seasonal fresh fruits and vegetables as follows (4 F. R. 1655):

* * * * *

(e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) "open country" or "rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and "immediate locality" shall not include any distance of more than 10 miles.

Effective June 17, 1939, the Administrator amended section 536.2 by changing the words "immediate locality" to "general vicinity" in paragraph (a); and by extending the population-dis-

tance test previously applicable to fresh fruits and vegetables to all agricultural or horticultural commodities. Sections 436.2 and 536.3 were accordingly amended and rearranged as follows (4 F.R. 2436):

* * * * * *

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), "first concentration point" means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing, or

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d), "immediate locality" shall not include any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930.

SECTION 536.3. *Petition for Amendment of Regulations.*—Any interested person or association wishing a revision of the foregoing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth the Administrator will either schedule a hearing with due notice to interested parties or will make other provision for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

Effective October 1, 1940, the Administrator amended section 536.2 of the regulations by inserting a special paragraph applicable solely to perishable or seasonal fresh fruits and vegetables as follows (5 F. R. 2647):

An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning

of perishable or seasonal fresh fruits or vegetables for market;

If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten.

By notices appearing in the Federal Register on September 12 and October 1, 1940, the Administrator postponed until December 1, 1940 and November 1, 1940, the effective date of parts of the regulations with respect to fresh fruits and vegetables (5 F. R. 3634, 3860).

Effective April 1, 1941, the Administrator again amended the regulations to apply the fresh fruit and vegetable definition to all commodities other than "dry edible beans," and "Puerto Rican Leaf Tobacco," so that sections 536.2 and 536.3 read as follows (6 F. R. 1476):

SECTION 436.2 *"Area of Production" as used in Section 13 (a) (10) of the Fair Labor Standards Act.*—An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), "first concentration point" means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

Section 536.3. *Petition for Amendment of Regulations.*—Any interested person or association wishing a revision of the foregoing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to in-

terested parties or will make other provision for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

Effective January 5, 1942, the Administrator amended section 536.2 (c) with respect to Puerto Rican leaf tobacco to read as follows (6 F. R. 5165):

* * * * *

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling unstripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), "first concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

No amendment of section 536.2 of the regulations has been made since January 5, 1942.

APPENDIX II

HEARINGS ON "AREA OF PRODUCTION"

(SECTION 13, (a) 10))

Reference No.	Date of hearing	Title	Number of volumes	Number of exhibits
.....	Nov. 14–15, 1938.....	Handling, Storing, or Preparing for market in Their Raw or Natural State, navy, cranberry, kidney, or similar types of dry edible beans.	2	25
48.....	Dec. 9–10, 1938.....	Petition of Cigar Manufacturers of America, Inc. et al.	2	8
54.....	Jan. 9–12, 1939.....	Fresh Fruits and Vegetables.....	4	43
58.....	Feb. 9, 1939.....	Informal Hearing on Petition of Poultry Handlers.	1	.....
71.....	Mar. 27, 1939.....	Petition of American Seed Trade Association.	1	6
72.....	Mar. 29, 1939.....	Petition of Association of Sugar Producers of Puerto Rico.	1	14
73.....	Apr. 3–4, 1939.....	Fresh Fruits and Vegetables: Rehearing (by the Administrator).	2	33
157.....	Apr. 8, 1940.....	Informal Conference on Redefinition of Area of Production.	1	.....
162a....	May 1–4, 1940.....	Packing (but not canning) of Citrus Fruits.	4	76
162b....	May 6–8, 1940.....	Handling, Packing, Storing, Preparing in the Raw or Natural State, but not Canning of Fresh Fruits and Vegetables.	3	63
162c....	May 9–11, 1940.....	Drying and Canning of Perishable or Seasonal Fresh Fruits & Vegetables.	3	98

FINDINGS AND RECOMMENDATIONS OF THE PRESIDING OFFICER

.....	Mar. 14, 1939.....	Release R. 226.....	
.....	July 20, 1940.....	Release G–80.....	

APPENDIX III

Legislative History of Sections 3 (f), 13 (a) (6) and 13 (a) (10) of the Fair Labor Standards Act of 1938

The purpose of this appendix is to trace the legislative history of Sections 3 (f), 13 (a) (6), 13 (a) (10), and the provisions relating to the term and concept "Area of Production" which is found in Section 13 (a) (10) of the Fair Labor Standards Act.

1. S. 2475 as introduced in the Senate May 24, 1937. The hearings.

For convenience the discussion in this appendix will refer only to S. 2475, although a companion bill containing substantially the same terms was introduced in the House at the same time.

As introduced, S. 2475 contained no provision using the words "area of production." The only provisions relating to agriculture were in Sections 2 (a) (7) and 19. Section 2 (a) (7) defined "employee" as not including "any person employed * * * as an agricultural laborer as such terms are defined and delimited by regulations of the Board." Section 19 conferred authority on the Board to make regulations, among other things, defining and delimiting employment in which persons are deemed to be employed as agricultural laborers.

Joint hearings of the bill were held before the Senate Committee on Education and Labor and the House Committee on Labor, June 2, 1937, to June 22, 1937.

At the hearings various witnesses urged that some allowance be made with respect to the maximum hours provision of the bill for employees engaged in handling, packing, processing, etc., perishable fruits, vegetables, or fishery products (Hearings, pp. 152, 373, 967, 1059, 1220).

Several witnesses urged that the agricultural exemption in the bill be broadened. Mr. Horace Herr, representing the National League of Wholesale Fresh Fruit and Vegetable Distributors, urged that Congress should draft the formula for drawing the line between agricultural and industrial activities. He stated:

> In section 2 (a), in connection with the definition of "employee," in paragraph 7, lines 3 to 11, page 4, the question is raised as to whether the Board should decide where the line should be drawn between agricultural labor and labor within the scope of the act, or Congress should draw the line. Is it the congressional intent that this program shall be as inclusive as possible or that its application should be restricted so as to impose none of its obligations upon employers engaged in activities directly affecting agriculture or inseparably intertwined with agriculture in the marketing processes? It may be that wherever the line is drawn, some injustices may result both to the employees, on the exemption side of the line, and to the employers, on the inclusion side of the line, the injustices to the latter resulting from

the labor-cost differential. This question is of some importance in this industry, where the commodities move in their natural state, where certain handling operations are dictated by the highly perishable character of the commodities, and where actual ownership, to a substantial extent, remains with the producer until the commodities are bought by the retail outlet; when the cost of grading, packing, loading for shipment, storage, and other marketing expense is charged back to the grower. There is involved in this question the cooperative packing plants and marketing associations and the movement of commodities, such as apples, into and out of storage. In the Social Security Act, agricultural labor is exempt and the definition of agricultural labor rests with the Commissioner of Internal Revenue. There has been considerable pressure to liberalize the definition. In the [wholesale] fruit and vegetable [distribution industry] code, as approved by both N. R. A. and the Agricultural Adjustment Administration, the line was drawn at the point where the commodity was on board the transportation facility, the code language being as follows:

"The industry as defined shall not include the production nor preparation, assembling, or loading at point of production of commodities for shipment."

It would seem that fixing the limit on agricultural activities, in a program of this kind, so directly relates to the national policy for agriculture, that the Congress, rather than the Labor Standards Board, should draft the formula for the dividing line. The Congress, at least, should say whether the doubt is to be resolved in favor

of the workers or in favor of the farmers (Hearings, pp. 1002–1003).

Mr. John H. Clippinger, representing the same organization, also urged that the bill be amended so as to draw a clear line of demarcation between an agricultural and nonagricultural laborer so as to avoid confusion resulting from the definition of agricultural laborer under the Social Security Act (Hearings, p. 1064).

Mr. Samuel Fraser, representing the International Apple Association, objected to the provisions of the bill which empowered the Board to define agricultural laborer. He contended that—

> All of the costs and charges of packing, packaging, washing, grading, conservation, putting the commodities on board some transportation agency for transportation to market, in the end come squarely out of the pocket of the grower (Hearings, p. 1084).

He suggested the inclusion in the bill of the following definition of agricultural labor:

> For the purpose of this act, the term "agricultural labor" includes all employees engaged in the planting, growing, spraying, harvesting, preparing for market, packing, conserving, processing, transporting, and marketing of fresh fruits and vegetables, and their delivery to storage or to a carrier for transportation to market, no matter by whom employed (Hearings, p. 1096).

Mr. W. S. Campfield, representing the Virginia State Horticultural Society urged that the uncertainty inherent in the definition of agricultural labor be removed, and that "agriculture should be

either all in or all out to avoid conflicts." He called particular attention to the dissatisfaction that would be occasioned by holding that a packing crew was within the provision of the bill while those engaged in picking fruit were exempt. He urged the adoption of the amendment proposed by Mr. Fraser.

Mr. Idus T. Gillett of the Dowlett Packing Co. of Canutillo, Texas, suggested that an exemption be given small canners operating in rural communities and employing fewer than twenty regular employees on a "year-round basis." He stated that raising wages in a cannery located in an agricultural community substantially above the prevailing wage in the community would cause chaos (Hearings, p. 1219).

Mr. Clippinger also argued that the exemption of employers with a small number of employees would upset the wage structure in the wholesale fruit-and-vegetable-distributing industry.

2. S. 2475 as reported by the Senate Committee on Education and Labor July 8, 1937 (Seventy-fifth Congress, first session, Senate Report No. 884)

The Senate Committee on Education and Labor rewrote the bill reporting an amendment in the nature of a substitute for the original bill.

In the amended bill the agricultural exemption was enlarged but the term "area of production" was not used.

The agricultural exemption, appearing in Section 2 (a) (7) read as follows:

> nor shall "employee" include any person
> * * * employed in the taking of fish,

> sea foods, or sponges; or any person employed in agriculture. As used in this Act, the term "agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in subdivision (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and any practices ordinarily performed by a farmer as an incident to such farming operations.

The report accompanying the bill contained only a brief statement that employee is defined so as to exclude—

> persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations (75th Congress, First Session, Senate Report No. 884).

Senator Black, chairman of the committee in charge of the bill, in opening the Senate debate of the bill stated that it—

> specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legis-

> lative enactments and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture (81 Cong. Rec. July 27, 1937, p. 7648).

Senator Tydings raised the question whether under the definition of agriculture an employee threshing wheat on another man's farm would be exempt (81 Cong. Rec. July 27, 1937, p. 7653). The exemption of seasonal canneries were discussed at pages 7655 and 7656.

The meaning of the word "dairying" as used in the agricultural exemption was the subject of a colloquy between Senator Pope and Senator Black which appears at page 7656.

The concept of "area of production" was first injected into the debate by Senator Copeland who read a telegram from the International Apple Association urging that the definition of agriculture be amended by adding the following:

> Or by an employee in connection with preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities (81 Cong. Rec., July 27, 1937, p. 7656).

Senator Copeland continued:

> That is the proposed amendment. The argument is this:
>
> "This amendment applies only to fresh fruits and vegetables in their raw and natural state within the area of production and does not extend to canning or processing or any operations which change them from their raw or natural state. The amendment would then make paragraph 7

the same in principle as recognized by N. R. A. and A. A. A. and under which the fresh fruit and vegetable industry operated. Under modern conditions, developed by necessity, it is of utmost importance to multitudes of small growers from coast to coast that packing-house operations and storing within the area of production be exempted; otherwise, community packing and uniformity of grade will be disrupted and, moreover, small individual growers are not in position to equip themselves with highly expensive washing and grading machinery. All of these costs come out of growers' pockets. Bear in mind we are asking that the amendment apply only to fresh fruits and vegetables which are highly perishable and in their raw and natural state only, and within the area of their production. There is well-established precedent for this under the carefully considered position taken by N. R. A. and A. A. A." (81 Cong. Rec., July 27, 1937, p. 7656).

Senator Black replied that—

The committee, after careful consideration reached the conclusion that the definition of employee as given in paragraph (7) of section 2, and which is the broadest definition that has ever been included in any one act, was sufficient to include every genuine bona fide farming activity (81 Cong. Rec., July 27, 1937, pp. 7656–7657).

He continued:

So far as I recall, no member of the committee favored exempting, for instance, meat-packing houses. I use that as an illustration and not that it is connected with

> the suggestion made by the Senator from New York. The committee was not in favor of exempting the packing business as it related to many agricultural products. I refer to packing as a business. The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors, I should say (81 Cong. Rec., July 27, 1937, p. 7657).

In response to questions by Senator Overton as to whether cotton ginning or sugar processing, if done by a farmer on a farm, would be exempt, Senator Black indicated that the test would be whether such processes were "ordinarily performed by a farmer as an incident to his farm operations" (81 Cong. Rec., July 27, 1937, pp. 7658–7659).

Senator Schwellenbach indicated that the bill put the small apple grower at a disadvantage. He stated:

> If I may, I should like to follow through some of the questions asked by the Senator from New York [Mr. Copeland] which the Senator from Alabama answered by reference to the growing and sale of watermelons.
>
> When an apple grower picks his apples and takes them into his own warehouse, as the Senator from New York has described, and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is no dispute about the fact that it is an agricultural operation. I should like to say frankly, however, that when he takes the apples into market and sells them on the streets of New York City, as the Sen-

ator points out, I cannot see that is an agricultural operation.

What I am interested in is the small apple producer who has a ranch so small that he cannot afford to maintain upon his own ranch a warehouse with the necessary machinery and equipment which such warehouses now must have under the rules and regulations of the Department of Agriculture on the question of spray tolerance. It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm, and who must send his apples to a central warehouse to have the same processing done—by "processing" I do not mean canning; I mean the removal of the spray—and the same sort of storage, and who must bear all these increased costs, as compared with the larger operator who can do these things upon his own place of business.

I cannot see anything fair about that sort of discrimination. It seems to me the point of difference should be when the agricultural operation stops.

The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes. If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in co-

operative warehouses and there have the same processes performed.

I think—and I should like to ask the reaction of the Senator from Alabama to the suggestion—that the line of distinction might be made at the point of agricultural operation; that so long as the operation is purely an agricultural one, it should come within the exemption. When it becomes a processing operation, a canning operation, it ceases to be an agricultural operation. When it becomes a marketing operation, and the product gets to the railroad station, or leaves the warehouse for the purpose of going to the railroad station, it ceases to be an agricultural operation.

I should like to have the Senator's reaction to that suggestion.

Mr. BLACK. I think perhaps I can give the Senator an illustration which will demonstrate how difficult it is to draw the line at the point he mentions.

Going into another phase of farming, let us take the man who raises hogs. A great many farmers who raise hogs kill their hogs on their own farms. They prepare the hogs for market on their own farms and then send out the product. As the bill is framed, there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; but if we should attempt to draw the line of distinction which the Senator has mentioned we would find that we should have to exclude meat packers, whom I know the Senator would not believe it desirable to exclude, and we should thereby step into a field which we do not wish to enter (81 Cong. Rec., July 27, 1937, pp. 659–9907).

Senator Reynolds suggested that an amendment exempting employers of ten or less employees would allay the fears of those who believed that small canners should be exempt (81 Cong. Rec., July 27, 1937, p. 7662).

The concept of "area of production" was proposed by Senator Schwellenbach in an amendment which would add to the definition of agriculture the following:

> the term "person employed in agriculture," as used in this act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state (81 Cong. Rec., July 30, 1937, p. 7876).

The following discussion took place on the proposed amendment:

> Mr. SCHWELLENBACH. Mr. President, on day before yesterday I discussed the situation upon which the amendment is based.
>
> The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. I should like to say that, so far as I am concerned, I cannot agree with the position taken by the Senator from Mississippi [Mr. Harrison], indicating that there might be some danger about extending this measure to agriculture. So far as I am concerned, I think there would be a regulation of hours and wages for all workers in the country; but the bill does not attempt to do that. The bill attempts to exempt agricultural workers. The situation in which I am principally interested is a situ-

ation involving the apple industry, and it is one in which, unless an exemption of this kind is made, there will be a discrimination against the small producer and in favor of the larger producer.

In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer.

Mr. CONNALLY. Mr. President, will the Senator yield?

Mr. SCHWELLENBACH. I yield.

Mr. CONNALLY. Of course, apple raisers are already exempt, are they not, under the term "agricultural workers"?

Mr. SCHWELLENBACH. The amendment applies only to the packing, storing, and preparing of fresh fruits and vegetables.

Mr. CONNALLY. The effect of the amendment is to exempt all employees of apple-packing plants; is it not?

Mr. SCHWELLENBACH. If they are engaged in the area of production, and so long as the apples are in their natural or raw state; yes, sir.

Mr. COPELAND. Mr. President, did the Senator include in his amendment the word "transportation"?

Mr. SCHWELLENBACH. No; I did not include the word "transportation," because I do not believe that the transportation should be exempt; and I did not include "processing."

Mr. COPELAND. If the Senator will yield further for a moment, we have the same problem of the apple grower in my State. The small orchardist has seasonal work in the neighborhood in the picking, sorting, storage, and transportation of his apples. What I mean by "transportation"—perhaps it is not the right use of the term—is the carriage of apples in the ripe season to the nearby markets, which in my case is New York City, and the work of those who drive the trucks and rush the apples from the cooperative or private storage house to the city; so does not the Senator think that word, too, should be used?

Mr. SCHWELLENBACH. I will say to the Senator that as the amendment was originally prepared it had "transportation and marketing" in it. I have tried to limit the amendment to what I consider agricultural operations. Perhaps I am incorrect about it, but I do not feel that taking apples into market and selling them are parts of agricultural operations.

Mr. COPELAND. I live in Rockland County, N. Y., which is on the New Jersey line; and while the city of New York is the largest market for the apples raised in Rockland County, a great many apples are disposed of in Newark, New Jersey. The truck of the farmer carries the fruit to the market in Newark, which is a standard market where merchants go to get material, and the farmer stays there on the market stand until he can dispose of his truckload of apples. That is what I have in mind, because, of course, the transaction of getting rid of the produce may take late afternoon and all night. So as I originally introduced the amendment I had in it "transportation and marketing," and also the language the Senator used, which makes it clear that the transaction is in the neighborhood; that it is not a great, big transaction involving a trip across the continent.

Have I made clear the thought I have in mind to the point where the Senator will accept the words "transportation and marketing" and make them an addition to his amendment?

Mr. SCHWELLENBACH. I will say to the Senator from New York that I studied the amendment very carefully; and when we get beyond the point of preparing, packing, and storing—those operations which can be done on the farm by the large farmer as compared with the small one—I feel that we are going beyond the point of agricultural operations, and that the work really is not agricultural work.

Mr. COPELAND. Mr. President, I disagree with the Senator, and do so, of course, in all good spirit; but what I am saying is founded upon actual knowledge. The

farmer may be a very small farmer. He may not produce more than one or two or three hundred barrels of apples, but in order to get them to market he has to put them on a truck—his own truck or a hired truck—and go the short distance, perhaps 20 miles, to the town where there is a central market where he may dispose of his product. That seems to me to be very obviously a part of the agricultural transaction, and yet I fear that I have not been able to convince the Senator from Washington to that effect.

Mr. SCHWELLENBACH. Possibly I have convinced myself the other way so thoroughly that the Senator's statement has not served to change my mind about the matter.

Mr. COPELAND. As a matter of fact, is not the problem quite a different one in the great apple country of the West, where there are tremendous crops of apples which are taken in large quantities to the railroad station and shipped on to New York, where we buy and eat those apples; while on the other hand, the small farmer in my section is not commercially engaged in the orchard business, as they are in the West, or as they are on the great plantation of the junior Senator from Virginia [Mr. Byrd]? What the small farmer of my sections does is a part of his farming transaction. He takes his apples to market and gets rid of them; and I want to help him as much as I can.

Mr. MCCARRAN. Is it not true, in keeping with what the Senator from New York has said, that in the State of the Senator who offered this amendment, the real truth is that the farmer takes the apples to a processing plant? I myself have seen this operation in the Senator's State, though

the Senator knows about it much better than I do. The farmer takes the apple from the orchard to the processing plant. In other words, that is where the apple is really graded and boxed and prepared for shipment.

It seems to me that the Senator from New York is entirely correct in stating that up to the point where the apple is boxed and ready for shipment it is and remains a product of the farm and is handled by the farmer. It seems to me the Senator is forgetting the real point of his amendment.

Mr. REYNOLDS. Mr. President, will the Senator from Washington yield to me?

Mr. SCHWELLENBACH. I yield

Mr. REYNOLDS. A moment ago, in explaining his amendment, the Senator from Washington made reference to orchards covering 15 or 20 acres. Am I to assume that the Senator had in mind the protection of the small producer?

Mr. SCHWELLENBACH. The production of the small producer as compared with the larger producer. In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill.

Mr. REYNOLDS. The small producer would hardly have more than 8 or 10 men employed in the gathering of a crop?

Mr. SCHWELLENBACH. He takes his apples to a warehouse, however, and there are more than 8 or 10 employed in the warehouse.

Mr. REYNOLDS. In that instance, would not the Senator's amendment exclude from the provisions of the bill the larger cold-storage plants, where there are employed hundreds of men, and would not the amendment of the Senator from Washington really exempt from the provisions of the law the larger refrigerating plants throughout the entire country?

Mr. SCHWELLENBACH. I limit my amendment to employees who are working upon products from the immediate area, products in their raw or natural state, in their preparation, packing, and storing. I do not think that in those operations there would be any large or enormous plants such as the Senator has in mind.

Mr. REYNOLDS. I gathered from the terms of the amendment that it would actually remove from the provisions of the bill the larger cold-storage plants throughout the country. Of course, many of them we find in the cities of New York, Chicago, St. Louis, San Francisco, and Seattle.

Mr. SCHWELLENBACH. Those are not in the immediate production area.

Mr. REYNOLDS. But they would be included.

Mr. SCHWELLENBACH. No; they would not be included because they are not in the immediate production area.

Mr. COPELAND. Mr. President, may I ask the Senator from North Carolina a question?

Mr. SCHWELLENBACH. I yield to the Senator from New York.

Mr. COPELAND. Let me ask the Senator from North Carolina whether in all probability the point I have in mind is not

provided for in the amendment he offered, which has just been adopted. His amendment, as I understand, applies the bill to those who employ 10 or more persons. Is that correct?

Mr. REYNOLDS. That is correct.

Mr. COPELAND. As the Senator understands his amendment, does it mean that to a fruit farm such as I have described, unless there are in excess of 10 persons, the act would not apply?

Mr. REYNOLDS. Under my amendment any firm, individual, association, or corporation employing 10 or less number of persons would not be subject to the provisions of the bill. That is why I made inquiry a moment ago as to whether or not the small producers of apples would not be reached by it. What I am particularly interested in ascertaining as to the amendment is whether or not it will be of material benefit to the small producer. I expect in a few moments to offer an amendment eliminating tobacco warehouses. There are 57 of them in North Carolina, and their work is seasonal. Eliminating them from the provisions of the proposed law would benefit the tobacco farmers of my State. So I am assuming that the amendment offered by the Senator from Washington would actually be of benefit to the small fruit growers of his State. That is the intent, is it not?

Mr. SCHWELLENBACH. That is the purpose of it.

Mr. CONNALLY. Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple

territory? There is no limit. The condition is that they are packing plants, and if they are, they are exempt.

Mr. SCHWELLENBACH. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

Mr. CONNALLY. My understanding is that the largest apple packing plant in the world is located at Winchester, Va., right in the heart of a great apple-producing region? That would be exempt, would it not?

Mr. SCHWELLENBACH. If the work done in that plant is as described in the amendment, it would be exempt.

Mr. CONNALLY. Why should a man engaged in packing apples be exempt, and a man packing lemons or oranges or grapefruit, not be exempt? What is there about apples that makes them entitled to exemption?

Mr. SCHWELLENBACH. The purpose of the amendment is not for protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines and their own equipment.

Mr. BARKLEY. Mr. President, will the Senator from Washington yield?

Mr. SCHWELLENBACH. I yield.

Mr. BARKLEY. I suppose that any establishment dealing with apples as they come from the orchard is dealing with them in their raw state.

Mr. SCHWELLENBACH. That is correct.

Mr. BARKLEY. There are many things which may be made from apples—for instance, applesauce, which I presume is not included within the regulations of the bill. But if we provide for the exemption of plants which are dealing with apples as a raw material, we include practically all plants which deal with apples, because they deal with them only as raw materials. Is that true?

Mr. SCHWELLENBACH. No; I think the Senator is incorrect in that suggestion. The exemption applies when they deal with them in their raw or natural state. If they start making cider out of them, or start making applesauce out of them, then they are processing and not dealing with them in their raw or natural state.

Mr. BARKLEY. They are dealing with the apple in its raw state?

Mr. SCHWELLENBACH. Not after they put it through the first grinder. It then ceases to be in the raw or natural state.

Mr. BARKLEY. Somewhere between the apple and the cider this proposed law will take effect.

Mr. SCHWELLENBACH. I do not think there would be any difficulty as to a construction of that kind, because once it gets to the point which the Senator from Kentucky describes, then it becomes processing.

and there is no inclusion of processing in the amendment.

Mr. BLACK. Mr. President, will the Senator yield to me?

Mr. SCHWELLENBACH. I yield.

Mr. BLACK. Would the amendment apply to a cannery?

Mr. SCHWELLENBACH. No.

Mr. BLACK. What would be the definition of the word "prepare"?

Mr. SCHWELLENBACH. "Prepare in the natural or raw state" is washing.

Mr. BLACK. It is limited, as the Senator understands, to the fruit as it actually comes from the tree?

Mr. SCHWELLENBACH. Yes.

Mr. BLACK. The Senator knows that the committee has tried to provide and is favorable to a complete exclusion of activities which are purely agricultural. We have tried to write the bill in such a way as to take care of that situation. What about the "area"? What would be the definition of "area"? Would it not be possible to define it more clearly to get the effect?

Mr. SCHWELLENBACH. *I gave considerable thought to that. I do not believe it is possible, and that is something which the board, which has been accused of receiving too much power, would have to decide. It would have to provide a definition of "immediate production area."* [Italics supplied.]

Mr. BLACK. The Senator believes that in order to obtain the effect of what the committee has tried to do in writing the bill, it is essential that this amendment be adopted insofar as this particular type of business is concerned?

Mr. SCHWELLENBACH. I feel so, and it is for that reason that I am offering the

amendment. (81 Cong. Rec., July 30, 1937, pp. 7876, 7877, 7878.)

At the suggestion of Senator Black that Senator Pepper be consulted regarding the proposed amendment, it was temporarily withdrawn.

Senator Reynolds proposed an amendment exempting from the provisions of the Act "tobacco warehouses, their employers or employees." (81 Cong. Rec., July 30, 1937, p. 7878.)

Senator Barkley suggested that the amendment should not be extended to warehouses "that are not seasonal * * *":

> There are some tobacco warehouses to which the tobacco is delivered during the tobacco season, but during almost the whole year the warehouse operators engage in the process of prizing and stripping and stemming. I do not think the Senator means to exempt warehouses of that sort that engage in more or less year-round activity. (81 Cong. Rec., July, 1937, pp. 7878–7879.)

The amendment was subsequently enlarged to include cotton compressors, cotton warehouses, cotton ginning and baling.

The amendment was subsequently rejected by a tie vote. (81 Cong. Rec., July 30, 1937, p. 7887.)

Senator Overton urged that cotton ginning was a step in the process of getting the farmers' agricultural product to market and that since the cost of ginning was imposed directly upon the farmer the operation should be exempt as an agricultural activity. (81 Cong. Rec., July 30, 1937, p. 7880.)

Senator McGill proposed an amendment making agricultural exemption applicable to practices ordinarily performed "on a farm" as well as by a

farmer, and adding to that exemption the words "including delivery to market." The discussion on this amendment follows:

Mr. McGILL. Mr. President, the purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a threshing machine outfit and employs a crew and is employed by a farmer to thrash his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included. It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

Mr. GEORGE. Is it the purpose of the amendment to exempt those who thresh grain?

Mr. McGILL. Those who thresh grain, who harvest grain, and deliver it to market.

Mr. GEORGE. Would the amendment also apply to the harvesting of any other crop?

Mr. McGILL. It would apply to any commodity produced on a farm.

Mr. GEORGE. Would it apply to peanut pickers who pick in the fields?

Mr. McGILL. Yes.

Mr. GEORGE. And who move peanuts to the market?

Mr. McGILL. Yes; that is my understanding.

Mr. GEORGE. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

Mr. BLACK. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

Mr. GEORGE. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

Mr. BLACK. Unquestionably.

Mr. MCGILL. I may say to the Senator from Georgia and other Senators that is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.

Mr. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?

Mr. MCGILL. That is true; and the language would also include all labor performed in making delivery to market.

Mr. GEORGE. I thank the Senator.

Mr. COPELAND. Of course, that would take care of my apple man, about whom I have been worrying, would it not? It would take care of the farmer who takes his crop of apples to the market, would it not?

Mr. McGILL. That is correct. (81 Cong. Rec., July 30, 1937, p. 7888.)

The amendment was adopted (81 Cong. Rec., July 30, 1937, p. 7888).

Senator McAdoo proposed an amendment substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

> Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits. (81 Cong. Rec., July 31, 1937, p. 7927.)

The following discussion ensued:

> Mr. McADOO. Mr. President, under the pending bill agriculture is excluded, but the definition of agriculture in the bill is not sufficiently broad to include work so closely connected with farming as to be substantially a part of it, such as packing, storing, and preparing for market.
>
> Further, it does not cover services which, in my State—California—where producer cooperatives flourish, are largely performed for the farmers by the cooperative associations of which the farmers are members. Among such groups in California may be mentioned the fruit growers' exchange, the raisin growers, the prune growers and others of a similar character. The practice in these cases is for the laborers to work for the association—that is, the cooperative—rather than for the individual farmer, and the association does the packing and pre-

paring for market, which elsewhere is generally done by the farmer himself.

These agricultural commodities are highly perishable, and the work which must be done by the packing houses and on the farms varies greatly with temperature variations. Twenty-four hours in advance one cannot know whether the crop must be moved. So, to fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill but will also protect the farmers, who, in my State at least, are engaged in a method of marketing, packing, and handling their crops which may differ from the methods employed in other States.

Mr. BARKLEY. Mr. President, will the Senator yield?

Mr. MCADOO. I yield.

Mr. BARKLEY. Regardless of the merits of the first part of the Senator's amendment, on which I do not wish to comment, the last part seems to me to make possible the interpretation that the exemption would apply to any product derived from agricultural products all through the process of manufacture, no matter to what extent or degree.

I appreciate what the Senator is trying to do; he wishes this proposed law to be inapplicable to the operations referred to by him. He seeks to strike out the language in lines 13 and 14, and proposes to substitute therefor the words—

"Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or

natural state, any products derived from any of the above agricultural pursuits."

"Any products derived from any of the above agricultural pursuits" might mean the manufacture of shoes, which come, of course, from leather, which comes from hides, which come from cows. It might be regarded to follow up the manufacture of horse collars, which are made of leather and straw, which are agricultural products. I am wondering whether the Senator wishes his amendment to go that far?

Mr. McADOO. I had not intended it to cover horse collars or shoes, I will admit.

Mr. BARKLEY. Horse collars are manufactured from products derived from agriculture, as the Senator knows, both as to the leather and the straw.

Mr. McADOO. Almost everything in the form of food and clothing is manufactured from products of the farm.

Mr. BARKLEY. Yes; but I do not think the Senator wants his amendment to follow these things from the farm through all the factories so as to exclude them from the operation of the bill because they are "derived from agricultural pursuits."

Mr. McGILL. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word "farmer," the words "or on a farm," and also by inserting in line 14, after the word "operations," the words "including delivery to market," it being the purpose of those amendments to exclude from the bill all labor performed on a farm, whether by contract with the farmer or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm. Does

not that cover what the Senator has in mind for his amendment?

Mr. McADOO. I do not think it is sufficiently broad. I may say to the Senator from Kansas so much of the preparation of our crops in California is through farm cooperatives that the alterations which have been made in the amendment I think do not widen it as much as is needed. I think, perhaps, I can meet the objection raised by our distinguished leader by omitting in lines 5 and 6 of my proposed amendment the concluding part, namely, the words "products derived from any of the above agricultural pursuits."

Mr. BARKLEY. That is the language I was afraid of, and I think that the Senator's amendment would be improved by eliminating those words.

Mr. McADOO. I am willing to strike out that part of the amendment and to submit the amendment in that form.

Mr. HATCH. Mr. President, will the Senator yield for a question?

Mr. McADOO. I yield.

Mr. HATCH. Would the Senator be willing to add, in lieu of the words which he now says he is willing to strike out, the language proposed by the Senator from Kansas [Mr. McGill] relating to delivery to market, say, the words "including delivery to market"?

Mr. McADOO. I have no objection to that.

Mr. HATCH. I believe, then, the Senator's amendment would cover everything included by the amendment of the Senator from Kansas.

Mr. McGILL. Mr. President, will the Senator from California yield?

Mr. McADOO. I yield.

Mr. McGILL. In response to what the Senator from New Mexico has just said, I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday such as mentioning harvesting, packing, and operations of that character. The amendment adopted yesterday was intended to include, and I think it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products to market. In my judgment, it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue of the narrower terms carried in it, will be rejected.

Mr. McADOO. Mr. President, the amendment suggested by me is not intended to eliminate the amendment to which the Senator from Kansas referred.

Mr. McGILL. But it strikes out the amendment to which I refer.

Mr. McADOO. Has the Senator the amendment before him?

Mr. McGILL. It was adopted yesterday and is in the Record. The Senator's amendment, if agreed to, would strike out entirely the lines covering the amendment to which I refer.

Mr. PEPPER. I ask the Senator from California if it would not meet his objection and at the same time preserve the liberal amendment inserted yesterday,

which was offered by the Senator from Kansas [Mr. McGill], to let the amendment of the Senator from California come after the amendment of the Senator from Kansas, so that the bill would provide:

"And including any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state."

Mr. McADOO. I consider that of the utmost importance where a large part of the services are rendered through farm cooperatives, and for that reason, while I do not want to affect the amendment of the Senator from Kansas, nevertheless I think the suggestion of my friend from Florida is worthy of consideration.

Mr. MCGILL. I appreciate the purpose of the Senator from California, but my judgment is that his amendment will operate simply as a limitation to the amendment I offered and will not broaden its scope.

Mr. ADAMS. The Senator from California has stricken from his amendment the clause "any products derived from any of the above agricultural pursuits," so that it merely applies to processing without saying whether it is an agricultural product or not. He has stricken out the definition of agricultural products.

Mr. PEPPER. The Senator from California has not stricken out anything, according to his later suggestion. He merely suggests that he will let the provision be added at the end of the amendment of the Senator from Kansas, so that it will take care of what he has in mind without interfering with the exemptions

which other Senators desire to have incorporated in the bill.

Mr. McADOO. From a hasty examination of the amendment which the Senator from Kansas (Mr. McGill) has brought to my attention, I cannot see how my amendment, if inserted in the bill, would have the effect which has been suggested. But, on the other hand, my amendment takes care of a situation involving the use of cooperatives.

Mr. GEORGE. I suggest to the Senator from California that, in my opinion, the amendment offered by the Senator from Kansas (Mr. McGill) yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind.

Mr. McADOO. Then I shall ask that further consideration of my amendment be deferred for the moment. I should like now to offer a second amendment to the amend-

ment of the committee. (81 Cong. Rec., July 31, 1937, pp. 7927, 7928, 7929.)

An amendment proposed by Senator Borah reading as follows:

> And provided further, that the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy-production areas in which milk, cream, or butterfat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in the Farm Credit Act of 1933—

was adopted. (81 Cong. Rec., July 31, 1937, p. 7947.)

An amendment proposed by Senator Overton including the ginning and baling of cotton in the defmition of agriculture was rejected. (81 Cong. Rec., July 31, 1937, pp. 7951–7952.)

An amendment proposed by Senator Reynolds exempting from the provisions of the act employers of five or fewer than five persons was rejected. (81 Cong. Rec., July 31, 1937, p. 7948.)

Mr. Schwellenbach's amendment relating to persons employed within the area of production in the preparation, etc., of fresh fruits and vegetables, was adopted. (81 Cong. Rec., July 31, 1937, p. 7949.) The bill was passed by the Senate on July 31, 1937, by a vote of 54 to 28. (81 Cong. Rec., July 31, 1937, p. 7957.)

3. S. 2475 as reported by the House Committee on Labor August 6, 1937 (Seventy-fifth Congress, first session—H. Report No. 1452)

S. 2475 as passed by the Senate was referred to the House Committee on Labor. As reported

on August 6, 1937, the bill contained the following provision relating to agriculture.

> Section 2 (a) (7) provided that the term "employee" shall not include any person employed in the taking of fish, sea foods, or sponges; or any person employed in agriculture. As used in this Act, the term "agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in subdivision (g) of Section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and any practices performed by a farmer or on a farm as an incident to such farming operations, including delivery to market. Independent contractors and their employees in transporting farm products from farm to market are not persons employed in agriculture.
>
> Section 2 (a) (10) defined *oppressive child labor* as meaning a condition of employment under which "any employee (as defined in the Act to exclude employees of agriculture) under the age of sixteen years. * * *
>
> Section 2 (a) (20) provided that "the term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or

storing such fresh fruits or vegetables in their raw or natural state."

Section 4 (c) (5) provided that the provisions of that subsection relating to the Board's power to declare maximum workweeks "shall not be applicable with respect to any person employed in connection with the ginning, compressing, and storing of cotton or with the processing of cottonseed, the canning or other packing or packaging of fish, sea foods, sponges, or picking, canning, or processing of fruits, or vegetables, or the processing of beets, cane, and maple into sugar and syrup, when the services of such person are of a seasonal nature: *And provided further,* That the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy production areas in which milk, cream, or butterfat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in Section 15, as amended, of the Agricultural Marketing Act."

Section 4 (c) (5) provided that "the provisions of this subsection shall not apply to employees engaged in processing or packing perishable agricultural products during the harvesting season";

Section 16 authorized the Board to make regulations including but not limited to regulations defining technical and trade terms used in the Bill.

The only changes proposed by the Committee were:

(1) Striking "ordinarily" from the definition of agriculture so that that definition included any practices performed by a farmer on a farm as an incident to farm operations without qualifications.

(2) Adding a provision to the definition of agriculture excluding "independent contractors and their employees engaged in transporting farm products from farm to market."

(3) Substituting for the words "ginning and baling" in the exemption from the hours provision of the Bill in Section 4 (c), the words "ginning, compressing and storing" and including in that exemption "the processing of cottonseed."

(4) Striking from the exemption from the hours provision in Section 4 (c) the reference to the Farm Credit Act of 1933 and substituting a reference to Section 15, as amended, of the Agricultural Marketing Act.

The report accompanying the Bill contained only the following comment:

> Air-transport employees subject to title II of the Railway Labor Act are also excluded from the definition of "employee" as are all persons employed in agriculture. "Agriculture" is defined to include, among other things, practices ordinarily performed by farmers or on a farm as an incident to farm operations. A committee amendment proposes to strike out the word "ordinarily" before "performed." A committee amendment proposes to make it clear that independent contractors and their employees engaged in transporting farm products from farm to market are not persons employed in agriculture.

The Rules Committee of the House refused to grant a rule permitting consideration of the Bill necessitating its abandonment during the First Session of the Seventy-fifth Congress.

On December 13, 1937, the Rules Committee was discharged from further consideration of the Bill by petition of the membership of the House.

Mrs. Norton, chairman of the House Committee on Labor, offered an amendment in the nature of a substitute for the Bill (82 Cong. Rec., December 15, 1937, p. 1572). The definition of agriculture in the proposed substitute was identical with the definition in the Bill as passed by the Senate with the amendments proposed by the House Committee on Labor. The amendment contained all the other provisions relating to agriculture in the Bill as passed by the Senate and proposed to be amended except those appearing in Section 4 (k) of the Senate Bill as reported to House (82 Cong. Rec., December 15, 1937, p. 1581).

Mr. Griswold also offered an amendment in the nature of a substitute containing substantially the same conditions as to agriculture as Mrs. Norton's. The Griswold amendment was rejected (82 Cong. Rec., December 15, 1937, p. 1604).

A series of amendments offered by Mr. Bland designed to exempt from both the wages and hours provisions of the Bill employees engaged in various processing of agricultural commodities were rejected (82 Cong. Rec., December 17, 1937, pp. 1776, 1777).

Likewise rejected was a proposed amendment including in the definition of agriculture operators of sawmills and manufacturers of lumber products employing not more than 25 persons (82 Cong. Rec., December 17, 1937, p. 1777).

An amendment offered by Mr. Kerr adding to the definition of "person employed in agriculture"

persons employed within the area of production and in the manufacture of packages or containers used in the shipment of fruit, fish, or vegetables was rejected (82 Cong. Rec., December 17, 1937, pp. 1777, 1778).

An amendment offered by Mr. Barden including in the definition of agriculture persons employed in connection with the selling of tobacco in auction warehouses was rejected (82 Cong. Rec., December 17, 1937, p. 1783).

Mr. Lea proposed an amendment substituting for the words "fresh fruits or vegetables" in the definition of persons employed in agriculture the words "fresh or dried fruits or vegetables, nuts or eggs" and inserting the word "dried" in the phrase "raw or natural state" (82 Cong. Rec., December 17, 1937, p. 1783).

A substitute amendment was offered by Mr. Lucas to Mr. Lea's amendment making the provisions of the definition applicable generally to "agricultural commodities" and adding after the expression "raw or natural state" the provision including persons employed by any cooperative association as defined in the Agricultural Marketing Act if the association is engaged in preparing, packing, or storing agricultural commodities in their raw or natural state.

Mr. Lucas explained his amendment in part as follows:

> Mr. LUCAS. In paragraph 7 of section 2 of this bill you will find a definition of "employees." Read along and in line 12 you will find the words "or any person employed in agriculture."

There is nothing further than that so far as the definition of people employed in agriculture is concerned until you arrive on page 8, subsection (20), where you have a definition of the term "persons employed in agriculture," which limits it to fresh fruits or vegetables, but you do not find in this bill at any other paragraph anything about who a person employed in agriculture is unless you refer back to section 2. This amendment merely provides that a "person employed in agriculture" shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state.

It broadens the definition and will adequately protect the farmers of my section. It exempts agriculture in all its branches and work incidental thereto, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmers' owned and controlled cooperative. *It should be understood that it applies only to the employees in the area to be determined by the Administrator where the commodity is produced.* [Italics supplied.]

Mrs. NORTON. Mr. Chairman, I rise in opposition to this amendment. If this amendment is accepted it virtually kills the entire section, since it takes out of the bill everybody who has anything to do with agriculture.

Mr. MAVERICK. Mr. Chairman, will the gentlewoman yield?

Mrs. NORTON. I yield.

Mr. MAVERICK. I want to say that in my district there are pecan pickers or shellers who work for 3 to 5 cents an hour! Think

of it! If this amendment goes on these people are apparently without any protection whatever, and this bill will do them no good. So this amendment ought to be rejected.

Mrs. NORTON. The gentleman is exactly right. I have letters from a number of those workers, and if there is anything to help them, it is to kill this amendment.

Mr. MAVERICK. If there is anything to be done, it can be done in conference. The conference can iron out these points.

Mrs. NORTON. Exactly. I sincerely hope this amendment will be voted down.

Mr. LEA. Mr. Chairman, will the gentlewoman yield?

Mrs. NORTON. I yield.

Mr. LEA. I call attention to the fact that the amendment does not affect picking, to which the gentleman from Texas (Mr. Maverick) refers. It has nothing to do with picking. It simply relates to the preparation of the farmer's product for the market after the fruit has been picked.

Mr. MAVERICK. When I say "pick" it does not mean picking it off the tree. It means breaking it and taking the nut out of the shell. These people are industrial workers, not agricultural. They should be protected by the minimum-wage law.

The amendment was adopted (82 Cong. Rec., December 17, 1937, pp. 1783, 1784).

An amendment, offered by Mr. Pace substituting for the words "and growing" in the definition of agriculture the explanation "cultivation, growing and harvesting," was adopted (82 Cong. Rec., December 17, 1937, p. 2320). The amendment was explained merely as perfecting the definition

by making it clear that harvesting was to be an exempt operation (82 Cong. Rec., December 17, 1937, p. 1785).

An amendment offered by Mr. Whittington including in the definition of agriculture "any person employed in connection with the ginning of cotton" was rejected (82 Cong. Rec., December 17, 1937, pp. 1786, 1787).

On December 17, 1937, a motion to recommit to the Committee on Labor was adopted, a subcommittee of the House Committee on Labor was appointed to revise S. 2475 on March 1st, 1938. A confidential subcommittee print dated April 7, 1938, contained the following definition of agriculture (Section 2 (a) (7)):

> As used in this Act, the term "agriculture" includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. The term "person employed in agriculture" as used in this Act shall include persons employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but shall not include employees of transportation contractors engaged in transporting farm products from farms to market.

The Committee on Labor rejected the subcommittee amendment and adopted a substitute for the Bill presented by Mrs. Norton. On April 21, 1938, another draft of S. 2475 was reported to the House as amendment in the nature of a substitute for S. 2475 (75th Congress, First Session, H. R. Report No. 2182). As reported, the Bill contained the following provisions relating to agriculture:

> Section 3 (f) contained the following definition of agriculture: "Agriculture includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, foxes, or poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."
>
> Section 3 (g) defined employee employed in agriculture as follows: "Employee employed in agriculture" includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market.
>
> Section 11 provided that the provisions of Sections 4 and 5 relating respectively to minimum wages and maximum hours, shall not apply to any air-transport employee subject to the provisions of title II of the Railway Labor Act; or (5) any employee

employed in the taking of fish, sea foods, or sponges; or (6) any employee employed in agriculture;

(7) any employee to the extent that such employee is exempted by regulations or orders of the Secretary issued under section 12.

Section 11 (c) provided that the "provisions of section 10 shall not apply to any employee employed in agriculture."

The report accompanying the Bill contained the following comment:

> Agriculture is defined to include farming in all its branches, and among other things to include the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, foxes, or poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.
>
> "Employee employed in agriculture" is defined to include individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state. It does not include employees of transportation contractors engaged in transportation of farm products from farm to market. The definitions of "agriculture" and "employee employed in agriculture" are important in connection with the exclusion of employees in agriculture from all the provisions of the committee amendment.

The Rules Committee was discharged from further consideration of the Bill on May 23, 1938, and the Bill was adopted in the House on May 24, 1938.

Congressman Biermann, on May 23, 1938, announced that he would propose an amendment designed to remove the hardship that the Bill in its present form "imposes on farmers." He stated:

> The Bill, as presently worded, imposes hardships on the farmers, which in no way serve the purpose of the Bill. In section 2 the purpose of the Bill is declared to be to remedy "substandard labor conditions." Nobody complains of substandard labor conditions in the creameries, cheese factories, and similar institutions in the farming areas. As Charles W. Holman, secretary of The National Cooperative Milk Producers' Federation, says:
>
> "Persons employed in agricultural processing plants in country districts are well paid and are envied persons in their community. Farm labor and, indeed, many farmers themselves would be happy to change places with those persons, fortunate enough to be employed in creameries, cheese factories, and country milk plants."
>
> Tomorrow I shall offer the following amendment, which I hope the committee will accept:
>
> "Strike out subsection (g) of section 3 and insert in lieu thereof: '(g) "Employees engaged in agriculture" includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, processing, pasteurizing, drying, or otherwise preparing agricultural commodities for market.'"

> Nearly every large farm organization in the United States has endorsed this amendment. I know of none that opposes it. It is a well-known fact that most of the cost—in most cases all of it—of running these farm factories is taken out of the amount the farmer receives for his product (83 Cong. Rec., May 23, 1938, pp. 7325, 7326).

On May 24, 1938, Congressman Biermann stated his amendment has been modified by omitting the term "processing" and including within the definition of employees engaged in agriculture, "individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter."

The debate on the amendment followed:

> Mr. BIERMANN. This bill is aimed at substandard labor conditions, and I submit that any Member of this House who is familiar with the kind of institution that this amendment I have offered is aimed at will agree with me when I say that substandard labor conditions do not exist in these institutions. In an amendment I inserted in the Record yesterday I included the word "processing." I call attention to the fact that in the pending amendment this word is stricken out. I struck it out for the reason that some Members thought that processing would include the making of cotton and wool into textiles, and rubber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm. The important point is that the farmer pays

the bill for this processing. Those of us who come from dairy sections know that the cost of making butterfat into butter or milk into cheese is borne by the farmer. There is no contention about that; no argument. The Members from the South will agree that the man who raises the cotton pays for ginning the cotton.

When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases, the farmer gets just so much less; and our contention and the contention of the farm organizations is that this bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country.

Mr. COFFEE of Nebraska. This amendment would not take care of those employed in the handling of these seasonal crops outside of the area of production, would it?

Mr. BIERMANN. No.

Mr. COFFEE of Nebraska. In other words, the Orange amendment and the gentleman's amendment are not in conflict?

Mr. BIERMANN. No; they do not conflict.

Mr. THOMPSON of Illinois. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men?

Mr. BIERMANN. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.

Mr. WHITTINGTON. With respect to the question propounded by the gentleman from Illinois, may I remind the gentleman from Iowa that the word "packers" occurs in the present Bill, so there is no difference between the amendment proposed and the provisions of the Bill under consideration. As I understand the gentleman's amendment, it is merely a clarification of the definition of the word "employee" under the terms of the Act.

Mr. BIERMANN. And it is the kind of clarification the farm organizations want. The question to be decided in voting on this amendment is whether or not the farms of the United States are going to have their definition of "employee" as applied to agriculture or whether it is going to be written by people who have a city viewpoint. I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding the big factories in Jersey City, New York City, and some of the other large cities, by the same token we who come from the farm areas are best qualified to say what terms should apply to labor in those areas. I may say that not a single employee in any one of these factories has made an objection to this, so far as I know.

Mr. WHITTINGTON. It is simply to permit the farmer to get his material prepared for market.

Mr. BIERMANN. I want to read a couple of sentences from a letter I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this Bill definitions such as proposed in my amendment. He states:

"We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture industries in rural areas."

That is all my amendment takes in. He states further as follows:

"Failure to exempt these operations when performed in rural areas where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in lower prices paid to farmers."

Mr. CRAWFORD. Does the gentleman's amendment exempt manufacturers of sugar beats in the rural areas?

Mr. BIERMANN. That is something that the Secretary will have to determine.

Mr. REILLY. Does the gentleman's amendment cover a pea'-canning set-up that is situated away from the farm on which the pears are grown?

Mr. BIERMANN. In a little town?

Mr. REILLY. In a little town; yes.

Mr. BIERMANN. But in the farm area?

Mr. REILLY. Yes.

Mr. BIERMANN. Yes; it does.

Mr. WADSWORTH. Let us look for a moment at the business of canning in a country canning factory. There are many of them in my district. I live within a mile of one and within 4 miles of another, and not to expose unduly any secret or make a remark of any particular importance, I sell sweet corn and peas to both of them.

The canning season starts in western New York, for example, first with early green peas around the first week or 10 days of June. The canning of peas goes on

until the middle of July or toward the end of July, with the later varieties winding up the season. Then there is an off season of 10 days or 2 weeks before sweet corn comes in. The sweet corn canning season lasts clear through August and nearly all of September. It is followed in turn by tomatoes, carrots, and beets and spinach.

Now, all during that period that factory has to work very irregular hours. Just like the farmer, it is the slave of the sun and the weather. If we have about 2 days of unduly hot weather the heat suddenly ripens the crop more rapidly than the canning factory or the farmers have calculated. The result is it has to be rushed into the factory with all possible speed in order that it may be canned in proper condition. While that is being done, which generally is not over once or twice in 10 days, the people in the factory work overtime. They probably do not work overtime more than once in a week or 10 days and seldom more than 2 or 3 hours of overtime.

This is a recognized custom in the trade. No one ever complains against it. The labor conditions are excellent, the whole thing is seasonal, and it is largely extra money to the operatives who get several weeks' work through the summer.

If that country canning factory is not exempt from the provisions of this bill, then all of its wage-and-hour limitations will be placed upon it, as well as the overtime provision, and when you increase the cost of processing fresh vegetables, you must expect one of two results. First, the factory must raise its price to the consumer—and I happen to know that they run on an exceedingly narrow margin—or

else reduce the price paid to the farmer, and that is always what is done. Whenever you increase arbitrarily the cost of processing these fresh vegetables the farmer gets less per ton for them. I have been through it myself.

Mr. GILCHRIST. The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work out there is slower than in cities.

There is no question involved as to the necessity for this amendment in the cities, and I would like to be for the bill if I can be. I deny the insinuation the gentleman from the city of Brooklyn made that we are trying to sabotage this bill. That gentleman has no interest in farms or farming. As was said by another, "There has not been a calf born in his district for 50 years." It is not the purpose to sabotage the bill, but if we do support the bill, it will be because it does not destroy our industries. The old bill provided for the things contained in this amendment. Why the change? The present bill takes care of the packing of apples, peaches, and pears, but it does not provide for such things as the canning of corn, the canning of tomatoes, or any of the other industries that the little villages depend upon and

must depend upon. You folks are going to deny them that right if you vote down this amendment. I know what is in the substitute amendment which has been talked about here. It is merely a red herring drawn across the train. The 10 weeks spoken of in the committee substitute will not do. It will not rescue us from the situation that you are putting on us. It does not provide for the things that my colleague from Iowa has provided in his amendment.

Mr. THOMPSON of Illinois. The amendment offered by the gentleman from Iowa, as well as section (g) of the committee amendment, is, in my opinion, entirely too far-reaching. I have no objection to exempting some of the small processors who do home curing and home canning from the provisions of this measure; but may I call the Committee's attention to the fact that in a large number of the smaller cities of our country, especially in the Middle West, there are many so-called small packing houses and canning plants. They are not so small after all. They employ two, three, or four hundred men and women and process various agricultural products. They kill pork, beef, lamb, and send it to the market, as well as can soups, vegetables, and fruits.

The canning plants in these small country towns do not do such canning for home consumption. They do it under contract for some of the large distributors of the country. The distributors from the large cities send out labels, and the commodities are then labeled and sent into interstate commerce to be consumed in the larger cities, and centers of population.

I think all will agree with me that these small canning plants and so-called small packing houses very frequently pay notoriously low wages and work their employees long hours during the season. If we are going to have constructive wage-and-hour legislation, we should protect the people in the small communities, the people in these one-industry towns and villages, who are obliged to work in these factories, there being no other employment available. I hope, therefore, the Committee will reject the amendment offered by the gentleman from Iowa.

Mr. Chairman, in this connection, and assuming that the committee will reject the Biermann amendment, I ask the chairman of the Committee on Labor, the gentlewoman from New Jersey, what is meant by the committee language in section (g) "but not commercial processing?" That is not clear in my mind and I would like to have a better idea of the committee's interpretation of that language which is in parentheses.

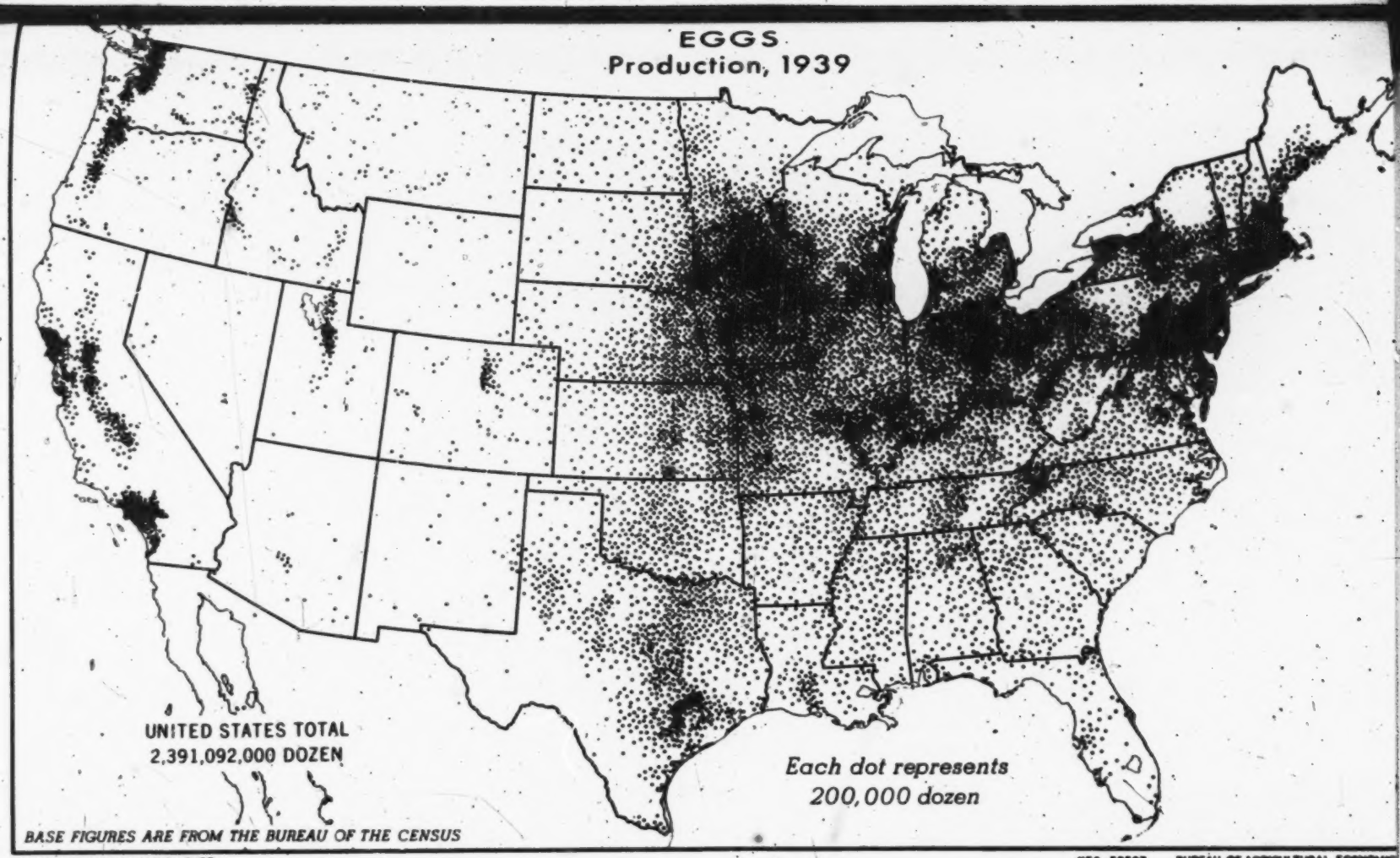
Mrs. NORTON. I may say to the gentleman it does not include making fertilizer or any of those commercially processed articles.

Mr. THOMPSON of Illinois. May I ask the gentlewoman this question: Where there is a small packing house or small canning plant engaged in packing or in canning, what do they do with the commodity? What do they do with the pork and beef they kill? What do they do with the vegetables they can? It must be for commercial consumption. They cannot eat it all themselves, and generally speaking, these plants are not cooperatives.

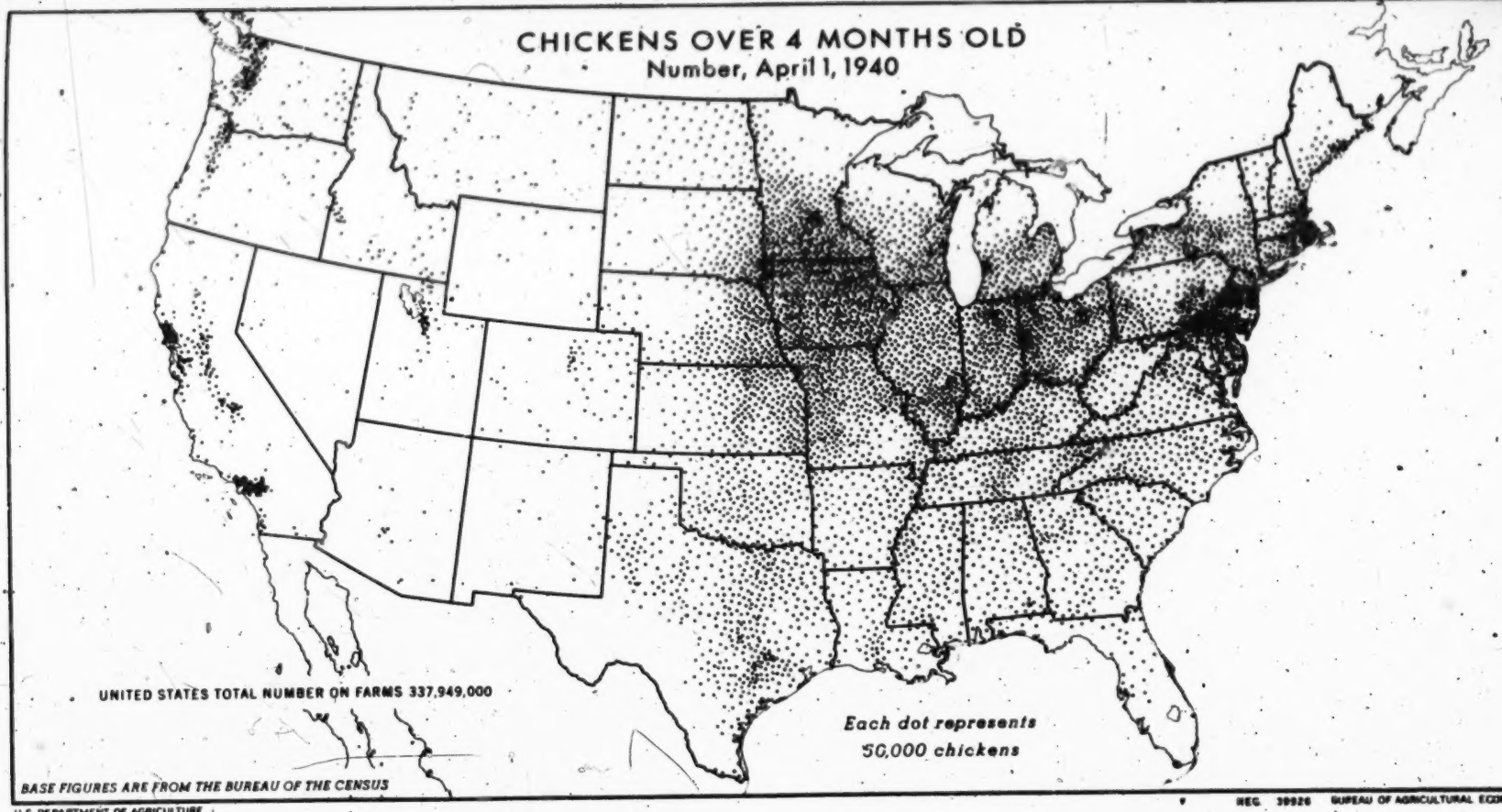
Mrs. NORTON. I may say that at the proper time I intend to offer an amendment which I think will take care of the small packing industries (83 Cong. Rec., May 25, 1938, pp. 7401, 7402, 7403, 7405, 7406.

The Biermann amendment was adopted by a vote of 159 to 134 (83 Cong. Rec., May 25, 1938, pp. 7407, 7408).

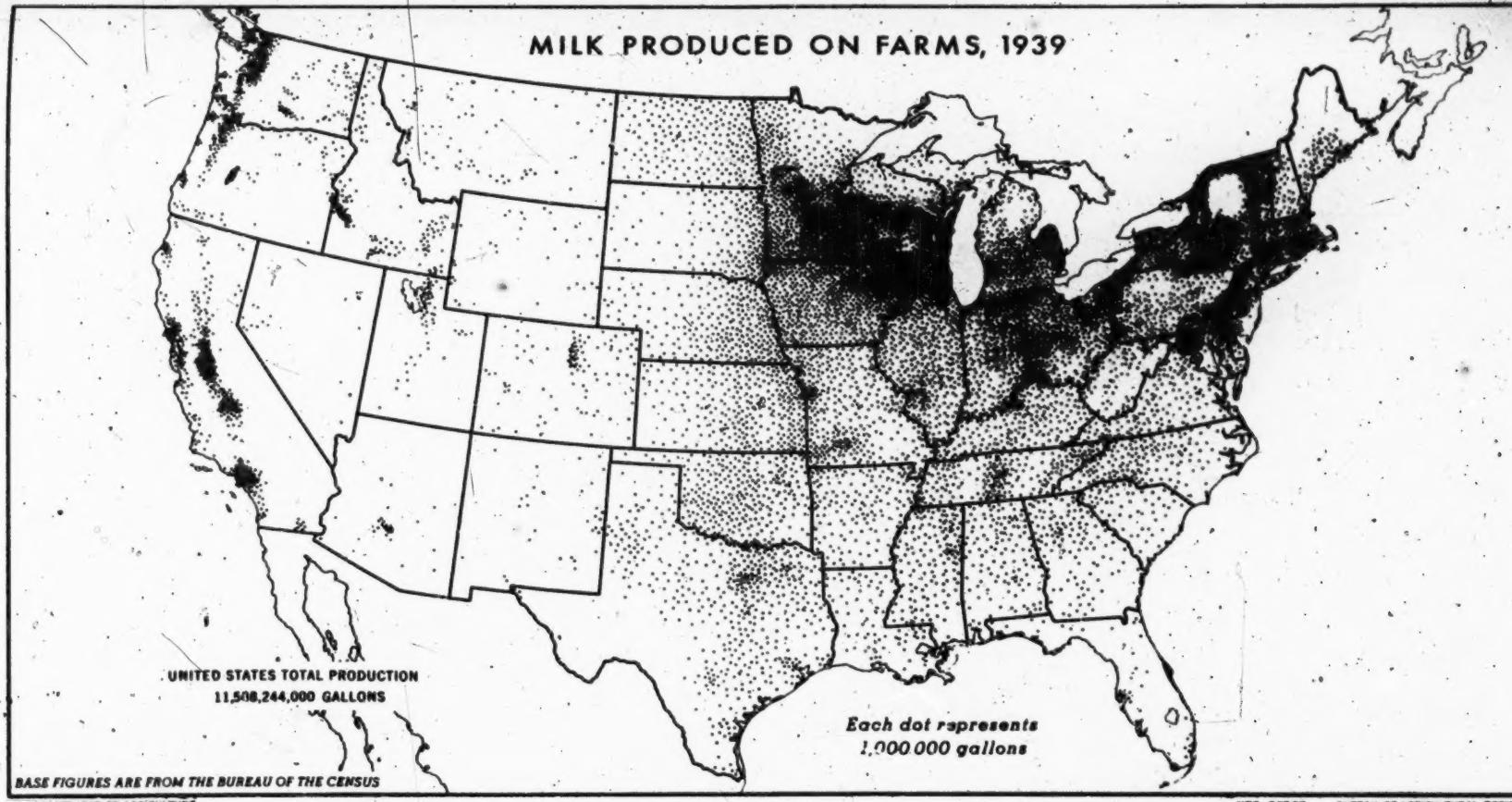
U. S. GOVERNMENT PRINTING OFFICE: 1944

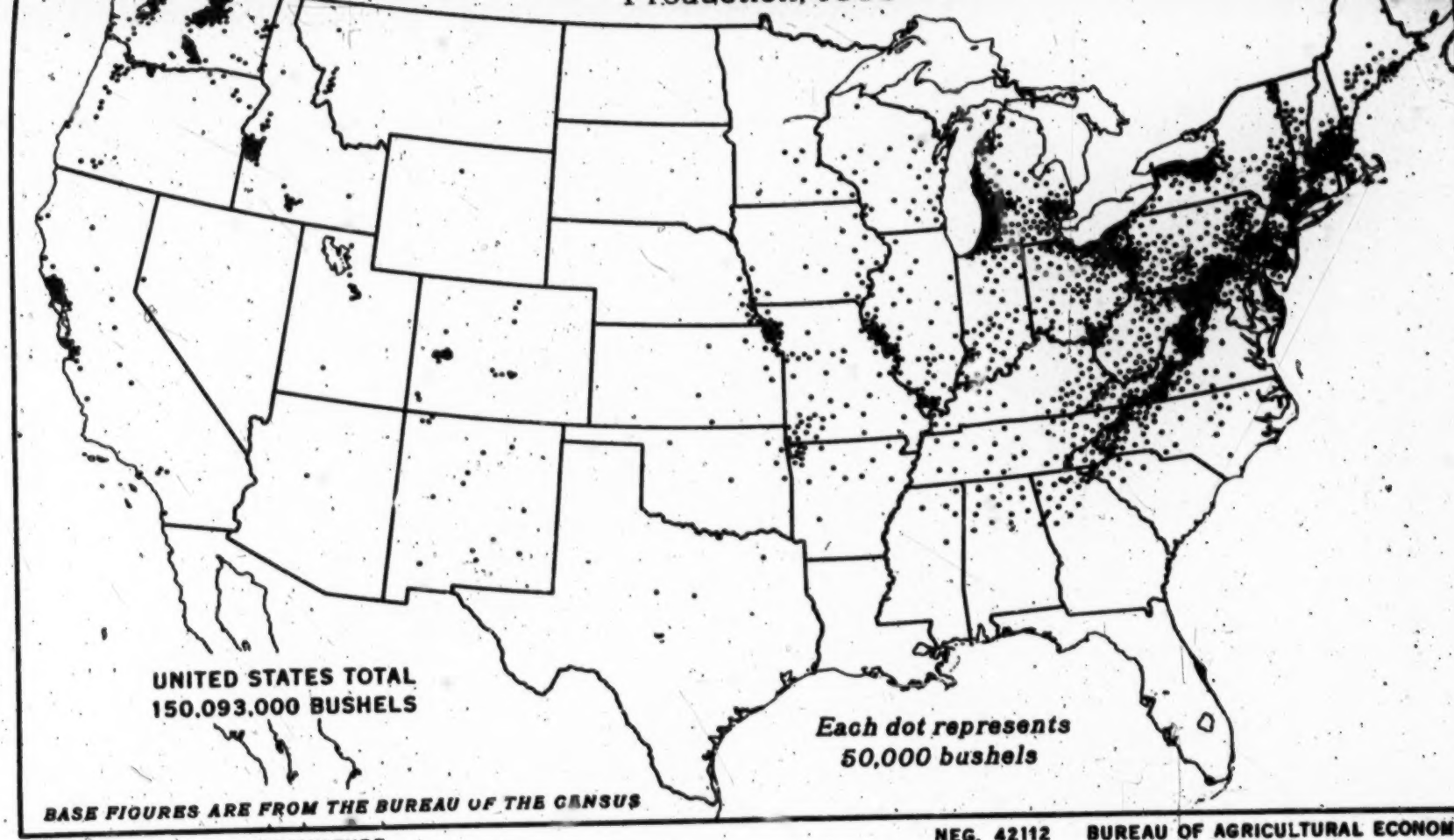


U.S. DEPARTMENT OF AGRICULTURE
NEG. 39367 BUREAU OF AGRICULTURAL ECONOMICS



U.S. DEPARTMENT OF AGRICULTURE
NEG. 39926 BUREAU OF AGRICULTURAL ECO


MILK PRODUCED ON FARMS, 1939
UNITED STATES TOTAL PRODUCTION
11,508,244,000 GALLONS
Each dot represents
1,000 000 gallons
BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS
U.S. DEPARTMENT OF AGRICULTURE



BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS

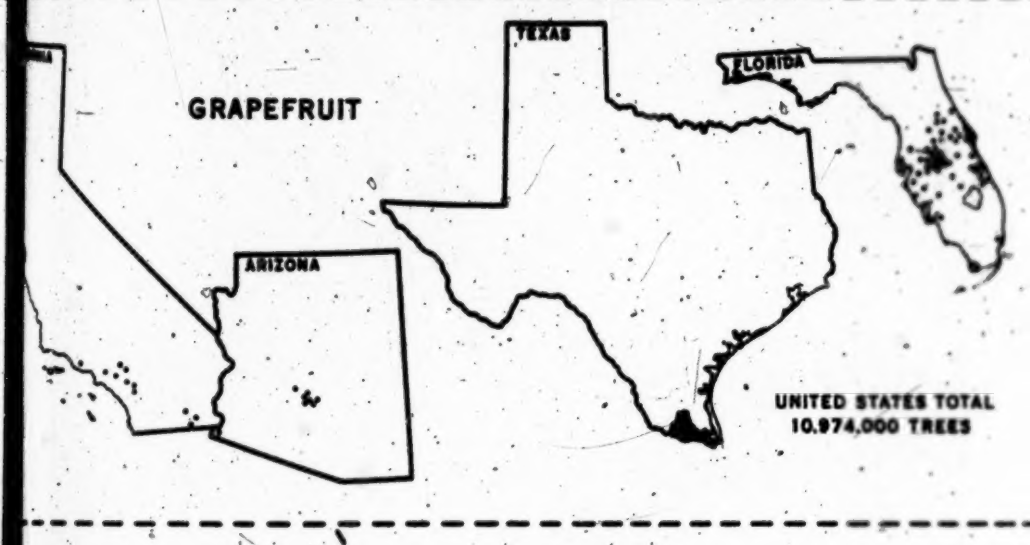
U. S. DEPARTMENT OF AGRICULTURE

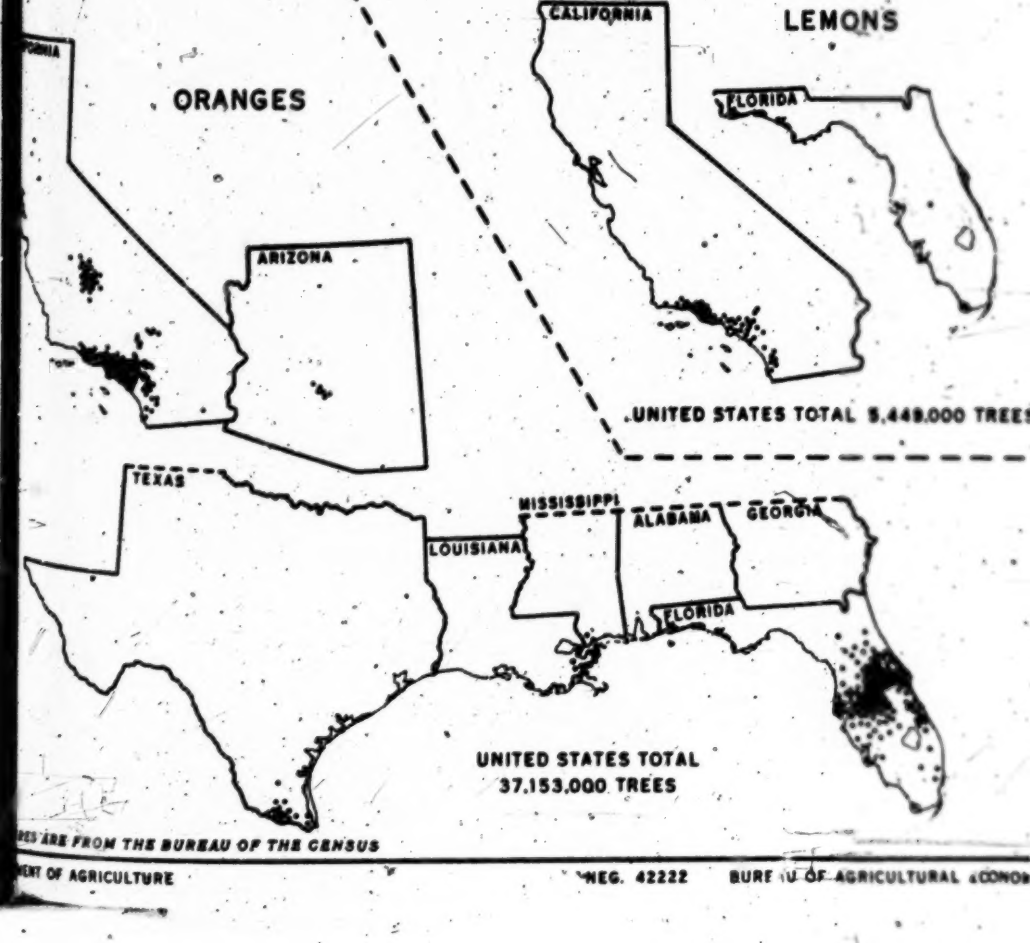
NEG. 42112 BUREAU OF AGRICULTURAL ECONOM

ORANGES, GRAPEFRUIT, AND LEMONS

Number of Trees, April 1, 1940

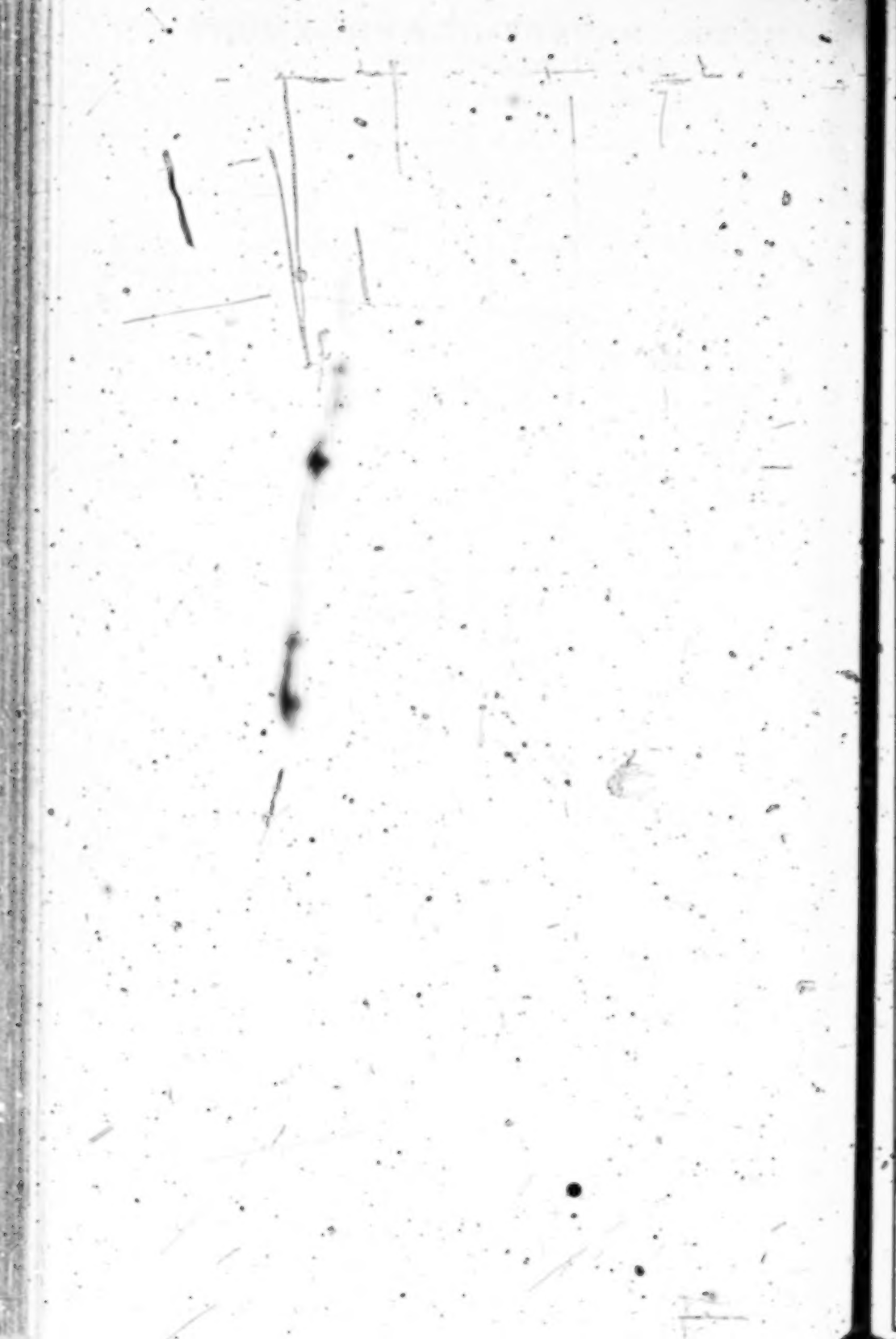
Each dot represents 100,000 trees

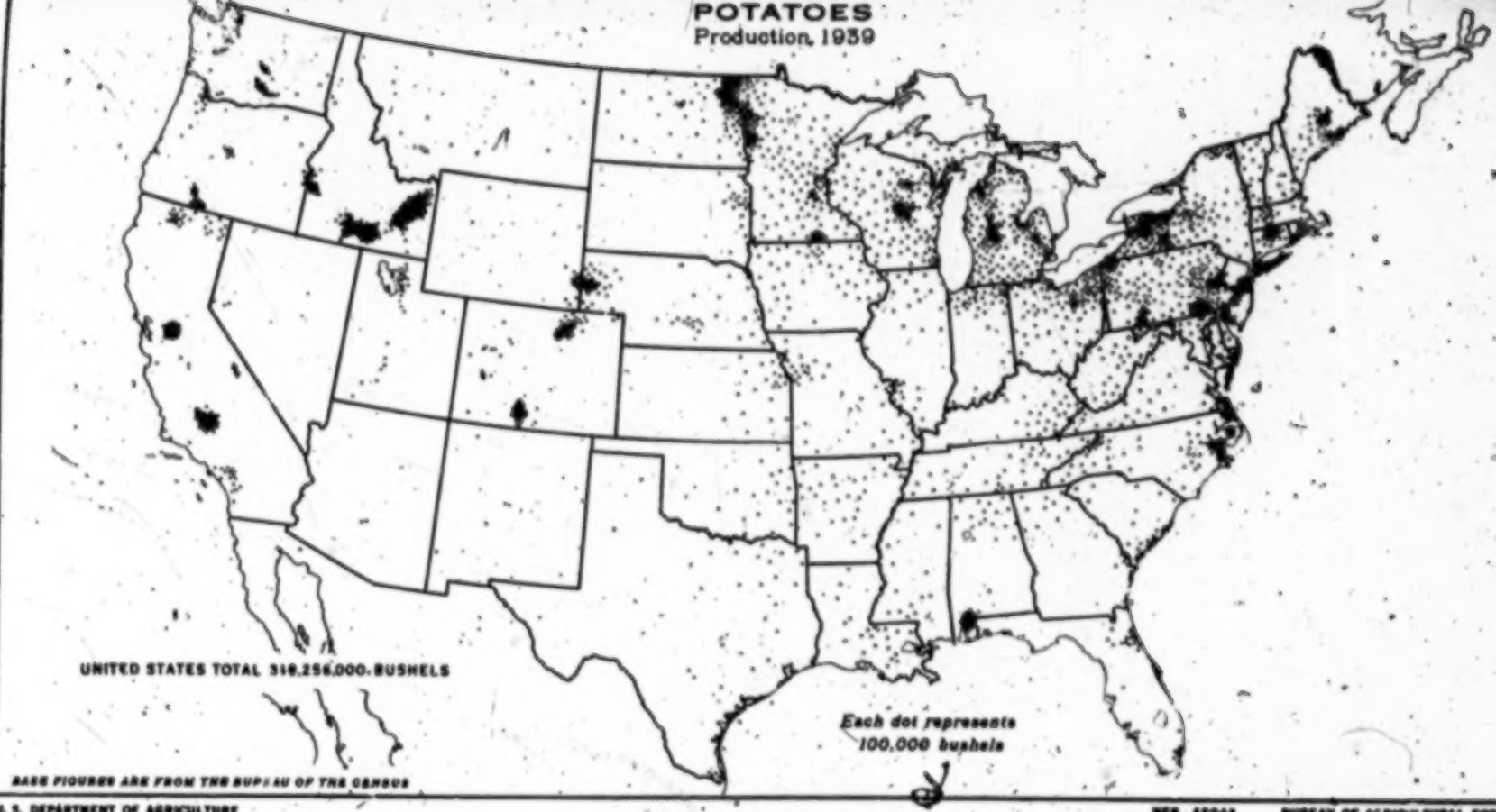




ES ARE FROM THE BUREAU OF THE CENSUS

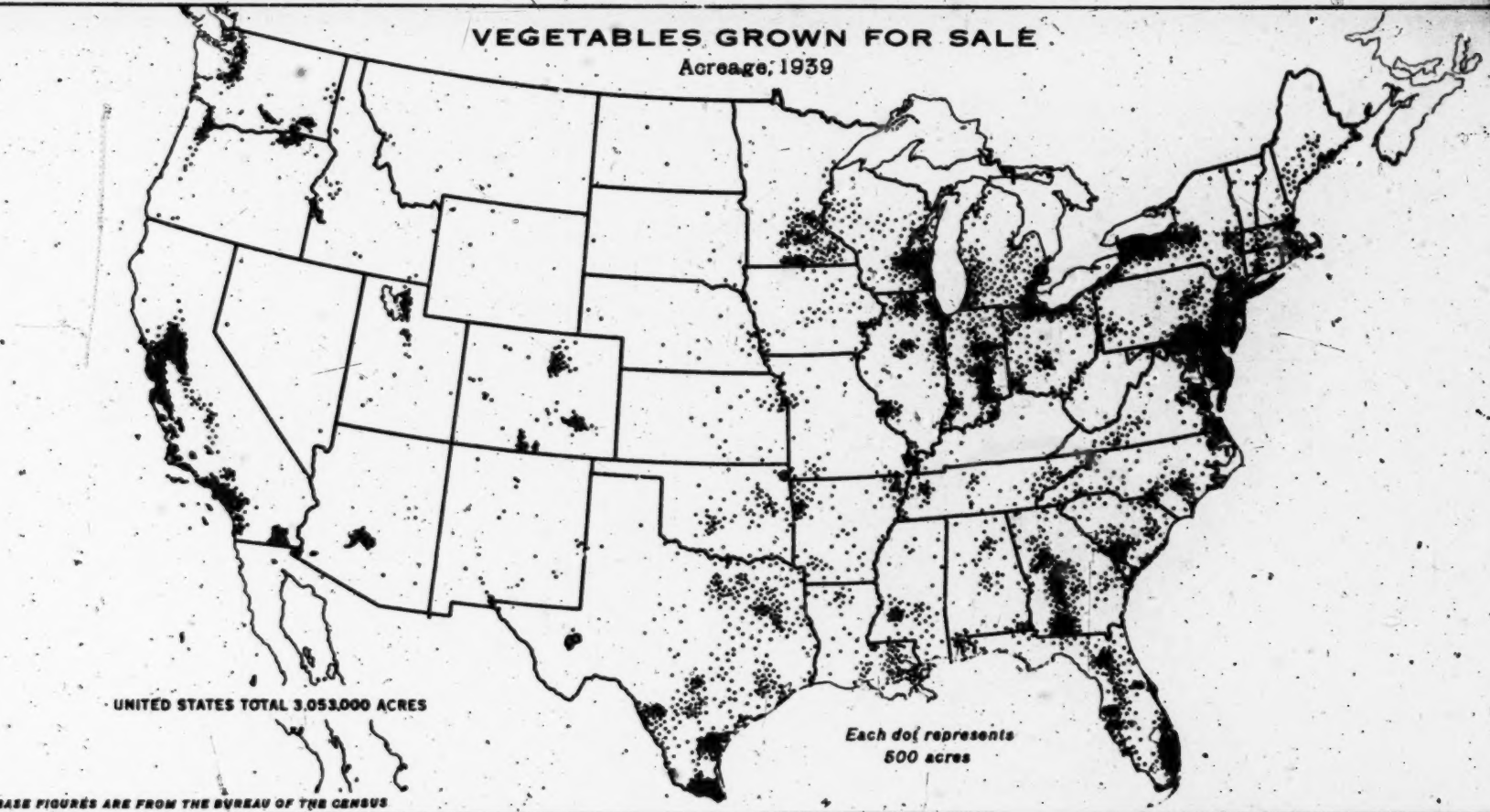
NT OF AGRICULTURE NEG. 42222 BUREAU OF AGRICULTURAL ECONOM




POTATOES
Production, 1939
UNITED STATES TOTAL 318,256,000 BUSHELS
Each dot represents
100,000 bushels
BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS
U. S. DEPARTMENT OF AGRICULTURE
NEG. 42044
BUREAU OF AGRICULTURAL ECO

VEGETABLES GROWN FOR SALE

Acreage, 1939



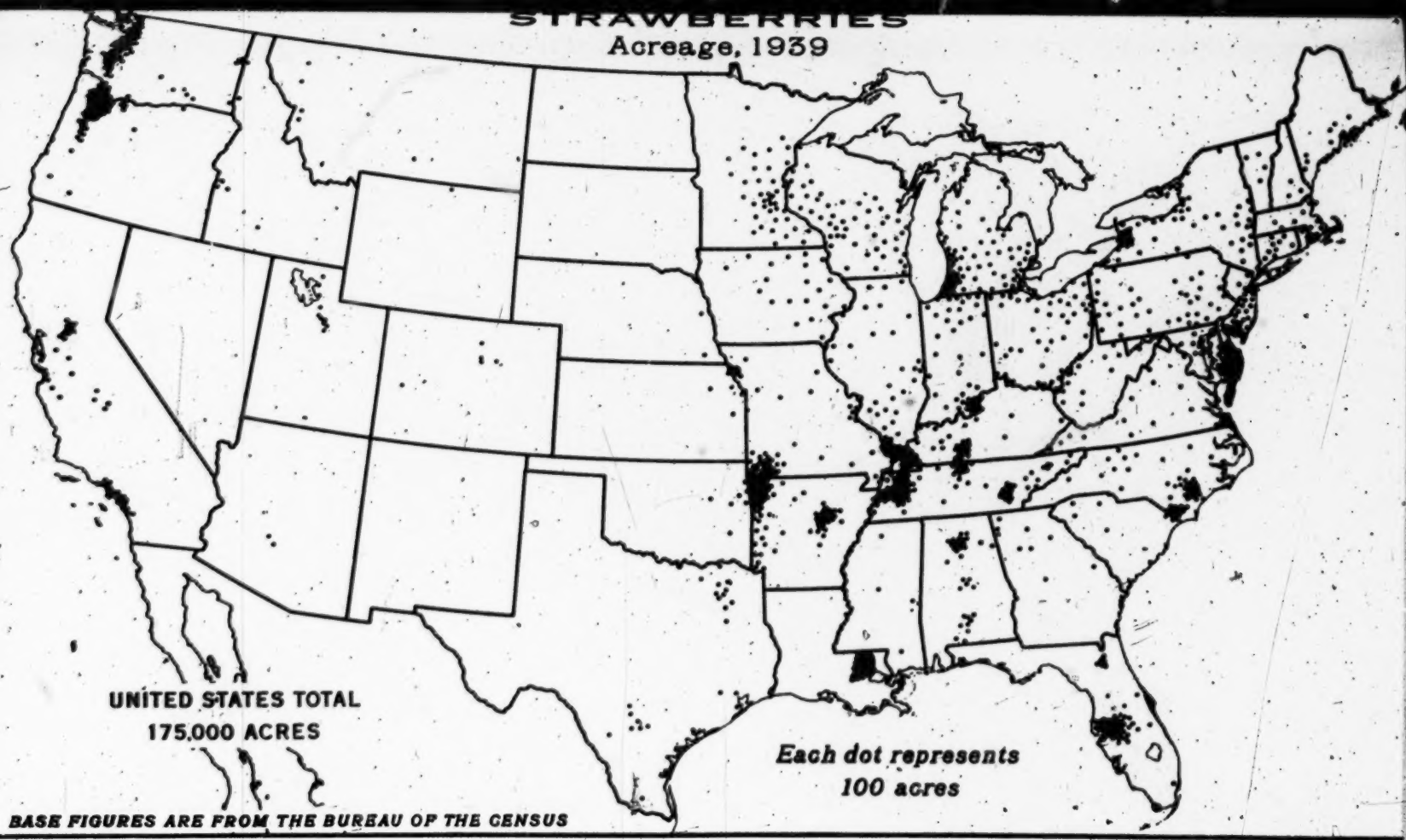
BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS

U. S. DEPARTMENT OF AGRICULTURE

NEG. 39979 BUREAU OF AGRICULTURAL ECONO

STRAWBERRIES

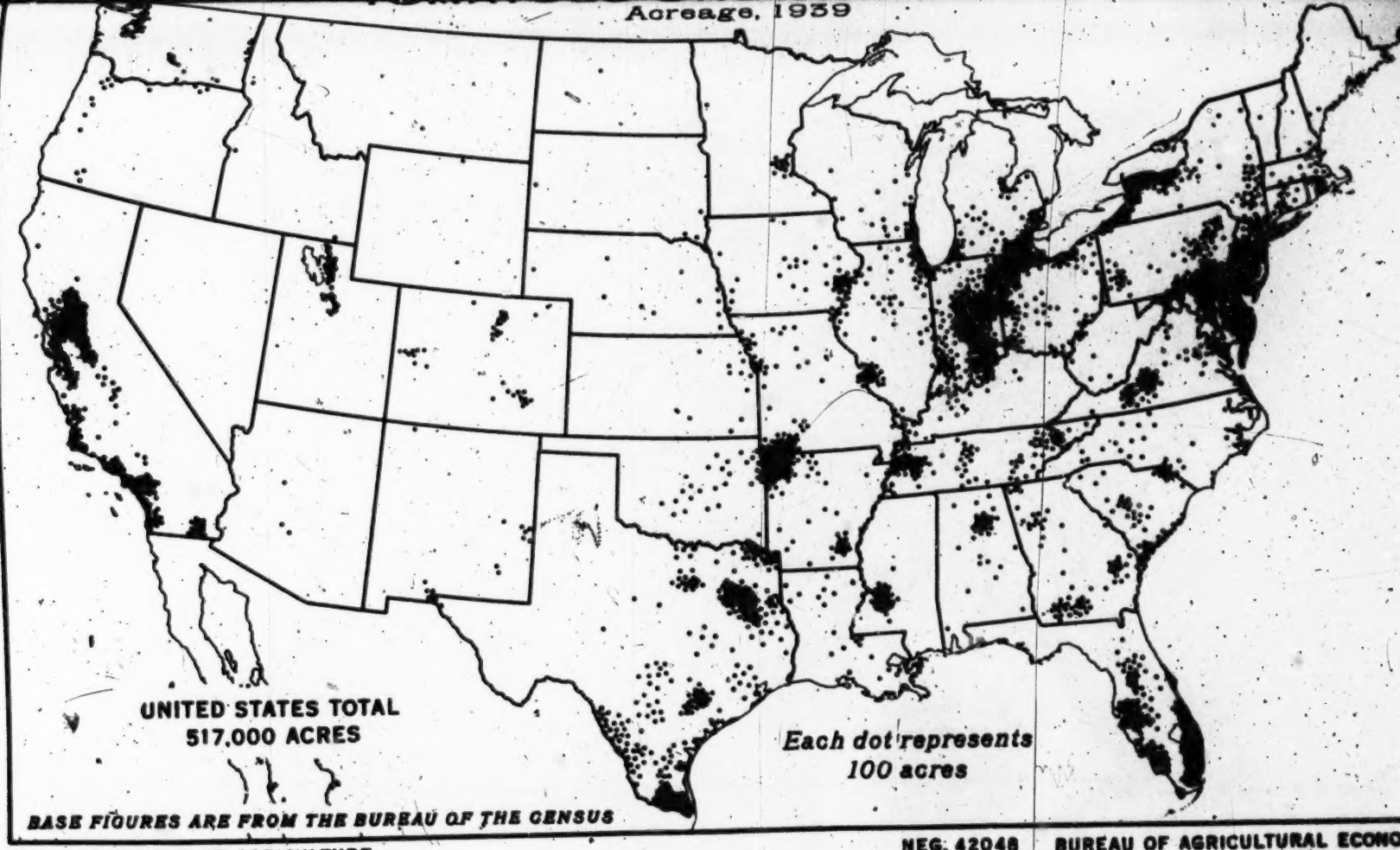
Acreage, 1939



BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS

U. S. DEPARTMENT OF AGRICULTURE

NEG. 42147 BUREAU OF AGRICULTURAL ECONOMI

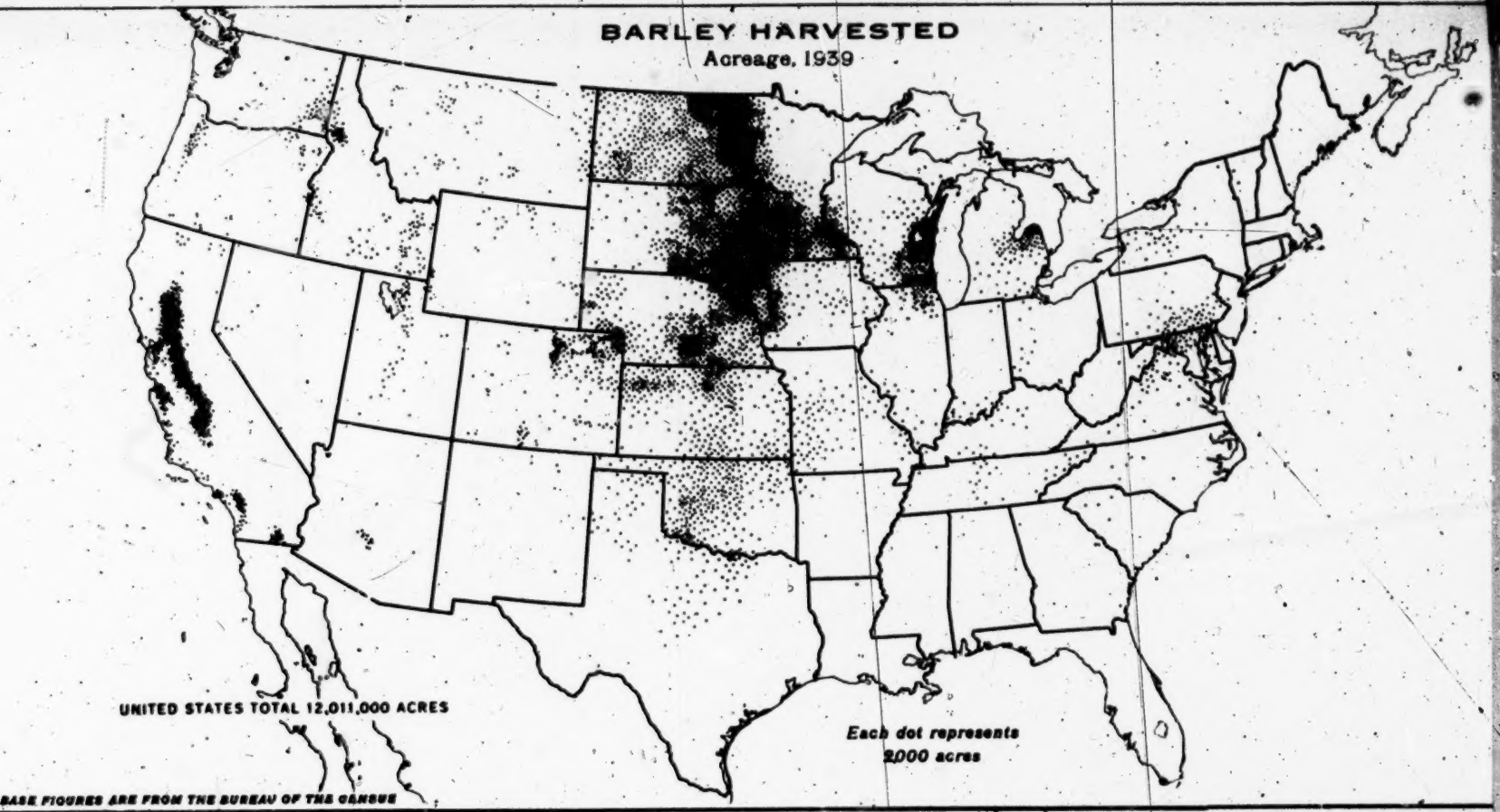


U. S. DEPARTMENT OF AGRICULTURE

NEG. 42048 BUREAU OF AGRICULTURAL ECONO

BARLEY HARVESTED

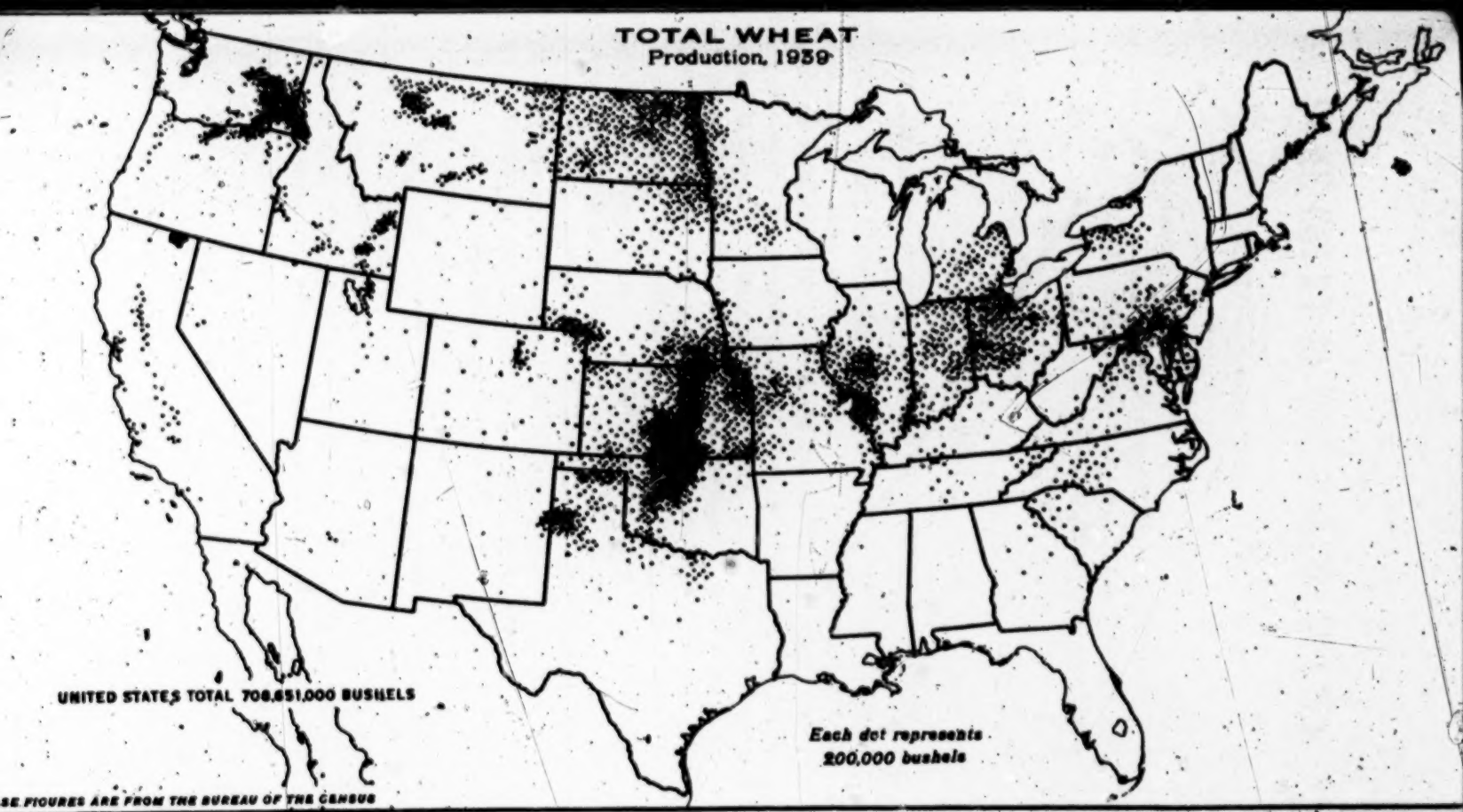
Acreage, 1939



BASE FIGURES ARE FROM THE BUREAU OF THE CENSUS

U. S. DEPARTMENT OF AGRICULTURE

NEG. 39750 BUREAU OF AGRICULTURAL ECONO


TOTAL WHEAT
Production, 1939
UNITED STATES TOTAL 708,651,000 BUSHELS
Each dot represents
200,000 bushels
SE FIGURES ARE FROM THE BUREAU OF THE CENSUS
DEPARTMENT OF AGRICULTURE
REG. 39978
BUREAU OF AGRICULTURAL ECO

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1943.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker and Luther Black, Petitioners,
vs.
Holly Hill Fruit Products, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 5, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit brought by employees of Holly Hill Fruit Products, Inc. for wage payments under the Fair Labor Standards Act. 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* A judgment for the employees, the petitioners here, was reversed by the Circuit Court of Appeals, which held that Holly Hill's employees were by virtue of § 13(a)(10) of the Act exempted from its scope, in that they were "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities for market . . .". The court below reached this conclusion by holding that a portion of the definition of "area of production" made by the Administrator of the Wage and Hour Division was invalid and that the remaining portion afforded exemption. 136 F. 2d 323. We brought the case here, 320 U. S. 725, to settle a much litigated question of importance in the administration of the Fair Labor Standards Act.

Holly Hill, a citrus fruit cannery employing some two hundred workers, is located in Davenport, Florida, a town with a population of about 650 people. During the two seasons in controversy—November 14, 1938, to May 26, 1939, and November 16, 1939 to March 30, 1940—the Administrator promulgated three regulations based on the scope he gave to his authority under § 13(a)(10) to define "area of production". The validity of aspects of these regulations is the crucial issue.

By regulation of October 20, 1938, the Administrator defined "area of production" as used in § 13(a)(10) to include an indi-

vidual engaged in canning "if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven". 29 Code Fed. Reg. (Supp. 1938) § 536.2(b). Effective April 20, 1939, an alternative definition, applicable to perishable or seasonal fresh fruits and vegetables, brought workers into the "area of production" if employed "in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality." It was provided that "'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than ten miles." 29 Code Fed. Reg. (Supp. 1939) § 536.2(e), pp. 2239-40. Finally, this alternative definition, no longer limited to fruits and vegetables, was in substance incorporated into the regulations effective June 17, 1939, but in addition it was provided that an individual might also be within the "area of production" "if he performs those [canning] operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven". 29 Code Fed. Reg. (Supp. 1939) § 536.2(a)(d), p. 2240.

Before coming to the main question, that of the validity of adding a limitation on the allowable number of employees in one canning establishment within the exempted geographic bounds, we shall dispose of the applicability of the Administrator's other exempting definitions to Holly Hill's employees.

The definitions which contain no employee limitation impose two essential conditions on an exemption sought under § 13(a)(10): the establishment must be located in a city of town having a population smaller than 2500,[1] and all of its products must be obtained from within ten miles of the establishment. Since Davenport contains less than 2500 persons, the first condition is met and we

[1] The fact that Davenport is within four miles of Haines City, with a population greater than 2500, led the district court to conclude that Holly Hill was not located in the "open country" or a "rural community". This appears to be a plain solecism. 29 Code Fed. Reg. (Supp. 1939) § 536.2(e), pp. 2239-40, and § 536.2(d), p. 2240.

need not pass on its validity.[2] As to the second condition, the only evidence introduced indicates that during the 1938-1939 season, about 2% of the fruit used came from beyond ten air miles of the plant, and that for the 1939-1940 season, about 3.75% came from groves more than ten air miles from Holly Hill. Since all of the fruit did not come from within ten miles, Holly Hill did not satisfy this condition of the Administrator's definitions. There can be no doubt that this conclusion is justified by a literal reading of the regulations, and the court below, in holding that the Administrator's requirement that all the goods come from within ten miles must be construed to mean "substantially all", entered the Administrator's domain. What was said in another connection is relevant here. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." Mr. Justice Holmes, dissenting, in *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41.[3]

We come then to the validity of the October 20, 1938, regulation and that of the alternative in the June 17, 1939, regulation which provide in substance that an individual is employed within the "area of production" if an establishment obtains the commodities from the "immediate locality" (1938) or all the materials come from the "general vicinity" (1939), and in addition the number of employees in the establishment "does not exceed seven". In short, when Congress exempted "any individual employed within the area of production (as defined by the Administrator)" (§ 13(a)(10)), did it authorize the Administrator not only to designate territorial bounds for purposes of exemption but also to except establishments from such exemption according to the number of workers employed.

Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the

[2] It is conceded that a specific ruling on the population criterion is unnecessary.

[3] Holly Hill here attacked the finding of the district court that all of the fruit did not come from within ten miles, but we see no reason to disturb it.

Fair Labor Standards Act.[4] Employment in agriculture is probably the most far-reaching exemption. Closely related to it is the exemption which is our immediate concern—those workers engaged in processes necessary for the marketing of agricultural products and employed "within the area of production" of such commodities. Such was the phrase and such its conjunction with the exemption for agriculture of which it formed an integral part as the bill passed both Houses, except that the enumerated exempted employments subsidiary to agriculture varied in the two bills.[5] The parenthetical qualification "(as defined by the Admin-

[4] "SEC. 13(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by-products thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations." 52 Stat. 1067, as amended, 53 Stat. 1266.

[5] The exemptions provided in § 13(a)(10) did not appear in the bill as reported to the Senate, but in the debate on the floor of that body an effort was made to extend the exemption accorded to agricultural workers, and as passed by the Senate the bill provided that "The term 'person employed in agriculture', as used in this act, insofar as it shall refer to fresh fruits and vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." 81 Cong. Rec. 7876, 7949, 7957. This provision, varied somewhat by extending its coverage to all "agricultural commodities" (82 Cong. Rec. 1783-1784), remained as part of the definition of "Employee employed in agriculture" (H. Rep. No. 2182, 75th Cong., 3d Sess., p. 2) until shortly before the bill was finally adopted by the House, at which time the so-called Biermann amendment included within the definition of employees engaged in

istrator)'' emerged from the conference committee of the two Houses.[6]

The textual meaning of ''area of production'' is thus reinforced by its context: ''area'' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and maximum hours.

In delimiting the area the Administrator may properly weigh and synthesize all such factors. So long as he does that and no more, judgment belongs to him and not to the courts. For Congress has cast upon him the authority and the duty to define the ''area of production'' of agricultural commodities with reference to which exemption in subsidiary employments may operate. But if Congress intended to allow the Administrator to discriminate between smaller and bigger establishments within the zone of agricultural production, Congress wholly failed to express its purpose. Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did

---

agriculture ''individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter.'' 83 Cong. Rec. 7401, 7407. At the conference on the disagreeing votes of the two Houses, the ''area of production'' provision was given the form in which it was finally enacted, and there the parenthetical phrase ''as defined by the Administrator'' was inserted after ''area of production''. 83 Cong. Rec. 9249.

[6] Compare this provision with § 13(a)(1) exempting employees in ''a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)''. For this class, the Administrator is given the authority to define and delimit the ''terms'' used. But in the same section, subdivision 10 grants authority to define not the term ''area'', but to define the ''area''.

so by appropriate language.[7] Congress referred to quantity when it desired to legislate on the basis of quantity.

Congressional purpose as manifested by text and context is not rendered doubtful by legislative history. Meagre as that is, it confirms what Congress has formally said. The only extrinsic light cast on Congressional purpose regarding "area of production" is that cast by the sponsors of this provision for enlarging the range of agricultural exemption. Senator Schwellenbach frankly stated that the largest apple packing plant in the world would be exempt if the "work done in that plant is as described in the amendment". 81 Cong. Rec. 7877. And in the House, Representative Biermann, while explaining his amendment in somewhat Delphic terms, did indicate plainly enough that he had in mind not differences between establishments within the same territory but between rural communities and urban centers: "may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401.[8]

From such light as Congress gave us beyond its words, it would appear that in giving exemption to an "area of production", without differentiating as between establishments within such area, Congress might well have considered that a large plant within an area should not be given an advantage over small plants in competing for labor within the same locality, while at the same time it gave the Administrator ample power, in defining the area, to take due account of the appropriate economic factors in drawing the geographic lines. In any event, Congress did not leave it to the Administrator to decide whether within geographic bounds defined by him the Act further permits discrimination between establishment and establishment based upon the number of employees. The determination of the extent of authority given

[7] See §§ 13(a)(2)(8)(11) dealing respectively with retail or service establishments, weekly or semi-weekly newspapers and public telephone exchanges.

[8] Representative Biermann was asked whether his amendment "would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men". This was his complete answer: "Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." Certainly Mr. Biermann did not give the remotest intimation that "area of production" was meant to convey any idea other than that which area usually conveys.

to a delegated agency by Congress is not left for the decision of him in whom authority is vested.

The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. Thus, in the Interstate Commerce Act, Congress prohibited a lower rate for a longer than a shorter haul, but it gave an authority to the Interstate Commerce Commission, undefined except as the general purposes of that Act implied the basis for affording exemption, to grant relief from this prohibition. *Intermountain Rate Cases,* 234 U. S. 476. Again in the National Labor Relations Act, Congress gave the Board authority to take such action "as will effectuate the policies of this Act." § 10(c), 49 Stat. 449, 454, 29 U. S. C. § 160(c). The "policies" of the Act were so broadly defined by Congress that the determination of "the relation of remedy to policy is peculiarly a matter for administrative competence". *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure the Fair Labor Standards Act like the National Labor Relations Act was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry, (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we

should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution "as a continuing instrument of government" but with part of a legislative code "subject to continuous revision with the changing course of events". *United States* v. *Classic*, 313 U. S. 299, 316.

Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. "The natural meaning of words cannot be displaced by reference to difficulties in administration." *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. 58, 80. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define "the area of production" beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." *Kirschbaum Co. v. Walling*, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a de-

fined area. But we cannot follow that Court in deleting this part of the administrative regulation and, by applying what remains of the definition, exempting Holly Hill's employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall. We can hardly assume that the Administrator would have defined "area of production" merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty.

Concluding, then, that when Congress granted exemptions for workers within the "area of production (as defined by the Administrator)" it restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him, the regulations which made discriminations within the area defined by applying the exemption only to plants with less than seven employees are *ultra vires*. But that leaves the difficult problem of the proper disposition of the case. It is our view that the case should be remanded to the district court with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress.

Such a disposition is most consonant with justice to all interests in retracing the erroneous course that has been taken. Neither law nor logic dictates an "either-or" conclusion—that is, a conclusion that the employment in these industries is entirely exempt because the Administrator misconceived the bounds of his regulatory powers although plainly enough he meant to exercise them so as not to withdraw all these employments from the requirements of the Act, or that employment in these industries is subject to the Act because no exception excludes it. The two opposing alternatives do violence to the law as Congress wrote it. To hold that all individuals "engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products" are

exempt from the operation of the Act is obviously to fly in the face of Congressional purpose. The Act exempts some but not all of the employees engaged in these industries, and it is not for us now to say that all are exempt. So to hold would postpone the operation of the Act in the enumerated instances for at least six years beyond the date fixed by Congress. Equally offending to the purposes of Congress and therefore to fairness in this situation is the suggestion that if the exemption falls all employees engaged in the designated industries are covered by the Act.

The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.

Such an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially is not unprecedented. Such was essentially the procedure which was devised to unravel the skein in *United States* v. *Morgan*, 307 U. S. 183. The Court did not feel itself balked by the kind of considerations that seemed controlling to a Baron Parke. The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness, have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law. See, *e. g.*, *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; *Inland Steel Co.* v. *United States*, 306 U. S. 153; and for some examples of this approach see *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 7 (Cardozo, Ch. J., dissenting). That such were the large considerations that guided decision in the *Morgan* case the opinion makes clear:

> " . . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain the end through co-

ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." 307 U. S. at 191.

If it be said that in the *Morgan* case the Court was dealing with a fund in court—irrelevant though that be to the governing principles of that decision—no such constriction can be made of the import of our decision in *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422. That like this was an action at law and not a suit in equity involving a *res*. The respondent was seeking to recover a sum admittedly due under a car-leasing agreement with petitioner. The Interstate Commerce Commission urged that since the Commission had not, as the law required, passed upon the validity of the practice involved in the agreement, the district court was without jurisdiction. And so, technically speaking, the district court was. But this Court remanded the case to the district court with instructions to hold the cause "pending the conclusion of an appropriate administrative proceeding." The petition for rehearing claimed that our decision involved retroactivity. 309 U. S. 694. So it did. But as against retroactivity we balanced the considerations that made retroactivity seem the lesser evil.

In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity in the evolution of more just results than the hardened common law afforded, has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases, such as those already referred to and in this, it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action any more than courts have found it difficult to sanction legislative ratification of acts originally unlawful, *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Tiaco* v. *Forbes*, 228 U. S. 549; *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *Hirabayashi* v. *United States*, 320 U. S. 81, 91, or retroactively to give prior legislation new scope. *Paramino Co.* v. *Marshall*, 309 U. S. 370. And in *habeas corpus* proceedings, even though a

petitioner was unlawfully in custody, this Court has allowed continued retention of custody until a valid order could be made. *Mahler* v. *Eby*, 264 U. S. 32; *Tod* v. *Waldman*, 266 U. S. 113.

Finally, there is no difficulty upon such a remand in requiring the Administrator to promulgate his definition. This Court has on several occasions required the Interstate Commerce Commission to take jurisdiction when it declined to do so or to discharge a duty laid upon the Commission by statute. *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638. See also *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178. The district court would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction.

Holly Hill also contended that if it is not entirely exempt from paying the overtime rates here awarded, it is entitled to the advantage of the partial seasonal exemptions afforded by §§ 7(b)(3) and 7(c). The district court ruled adversely to Holly Hill on these claims, but the Circuit Court of Appeals did not reach them. It will be time enough to reach them if they survive the disposition now made of this case.

Accordingly, the case is remanded to the district court to proceed in conformity with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1943.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, Sallie Baker and Luther Black, Petitioners, *vs.* Holly Hill Fruit Products, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 5, 1944.]

Mr. Justice Roberts.

I agree with the opinion of this court and with the opinion of the Circuit Court of Appeals that the Administrator was without power (if "area of production" is to have any sensible meaning) to exclude from the area and from the operation of the exemption workers in a processing plant clearly within the area on the ground that a certain number of employes worked in the plant. If Congress, when it said that the area of production should be defined by the Administrator, meant that that official should have a roving commission to create exemptions from the Act, the entire provision must fall as an unconstitutional attempt to delegate legislative power. We should never, however, construe an Act in a sense which would render it unconstitutional if a different and permissible construction will save it.

The legislative history makes it clear enough that Congress wished to exempt plants processing agricultural commodities in the locality of the farms which produced the commodities. Realizing that the ascertainment of the facts in particular cases would be essential to definition or delimitation of the area served, Congress, by the phrase "as defined by the Administrator", meant to permit him to draw lines in delimitation of areas appropriately to correspond to the facts. I construe the word "define", in this context, to mean "ascertain the facts and announce the result of such ascertainment." The opinions of the court below elaborate this view.

I think the Administrator's order may well be allowed to stand with the illegal and unauthorized feature of it deleted. This is

what the Circuit Court of Appeals decided and I believe it was right. Other features of the order were not, and are not, attacked and if, for the future, the Administrator desires, in other aspects, to amend his order, there is nothing to prevent. This would lead to affirmance of the judgment of the Circuit Court of Appeals and, if I could make my vote effective to that end, I should vote for affirmance. The other members of the court, however, are for reversal, but are divided on the question whether the judgment of the District Court should be affirmed or the case held in that court pending amendment of the order by the Administrator. Entertaining the views which I do, I cannot vote to affirm the judgment of the District Court, but that will be the effect of my action if I vote simply to reverse the judgment of the Circuit Court of Appeals. While I think none of the authorities cited in the opinion of Mr. Justice FRANKFURTER justify the procedure there outlined, I am constrained to vote in accordance with his opinion.

I am clear that, if the Administrator is to be permitted to amend his order, or to enter a new order effective from the date of the one under attack, he may not resort to gerrymandering or to any other device to accomplish by indirection what the decision holds he cannot do directly. I personally believe the scope of his discretion is more limited than some of my colleagues think and I do not wish my concurrence in the remand of the case to the District Court, to be there held pending the promulgation of an amended order, or a new order, to be taken as approving in advance the views expressed as to the extent of the Administrator's discretion.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1943.

Wilma E. Addison, Ernestine C. Lyles, Edgar Campbell, et al., Petitioners, vs. Holly Hill Fruit Products, Inc. } On Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 5, 1944.]

Mr. Justice Rutledge, with whom Mr. Justice Black and Mr. Justice Murphy concur, dissenting.

In my opinion the Administrator has defined "area of production" in a valid manner, and therefore the employee petitioners should prevail. But if, as the majority hold, his definition is not valid, then the exemption is not operative, and for that reason the petitioners likewise should prevail. I dissent, therefore, from the Court's conclusion that the definition is void. I dissent equally from the wholly novel disposition it makes of the cause on that hypothesis, in remanding it to await the Administrator's retroactive redetermination of the parties' rights.

I.

The basic issue, as the case was presented, is whether the Administrator can include in the definition not only spacial limits but also a limit upon the number of employees in exempted establishments. The Administrator included this factor in his first definition;[1] later reexamined it in extensive hearings;[2] concluded on the record thus made that no purely geographical definition could be conformed to the major legislative policies announced in the statute;[3] has retained it in each of several later definitions,

[1] Promulgated October 20, 1938, effective four days later. 3 Fed. Reg. 2536.

[2] See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, Department of Labor Ref. Nos. 54; 73; 162a; 162b; 162c.

[3] Tests proposed and considered included: the mapping of producing territories; a flat mileage-population definition; a "first concentration point" criterion; a standard which would include only establishments which handled and prepared for the account of the farmer commodities to which he retained

varying in other details, framed after extensive hearings;[4] and now earnestly insists it, or an equivalent limitation on size of the plant, must be included, unless any definition he may make is to work havoc with some major policy of the Act, either by exempting large numbers of industrial employees[5] or by creating disturbances of competitive situations, both for farmers and for canners and packers,[6] which the statute expressly sought to avoid.

The Administrator's task is highly complex. It involves defining exemptions for employees throughout the nation engaged in "handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products." Section 13(a)(10). All these operations follow immediately upon harvest and removal from the field or milking. All can be done on the farm and frequently are done there, but may be done elsewhere, often in factories. All consist in the first stages of preparation for market.

But whether the specified operations will be done on the farm, as part of the farm work or away from it, and in either small neighborhood establishments or in larger industrial plants, will depend upon a variety of factors as great as that which comprehends the whole vast process of starting the nation's crops, over 300,[7] on their respective marketing courses. The initial steps in marketing such widely different products as cotton and apples; tobacco and milk; potatoes and citrus fruits; legume crops, wheat, corn and other grains, on the one hand, and tomatoes, strawberries, truck garden products, etc., on the other, are within the delegation.

---

title. All these and others were rejected by successive administrators, after being urged and opposed by industry representatives, as presenting insuperable obstacles to carrying out the statute's major policies.

[4] Compare the definition promulgated October 20, 1938, 3 Fed. Reg. 2536, with the amendments of April 20, 1939, 4 Fed. Reg. 1655; June 17, 1939, 4 Fed. Reg. 2436; October 1, 1940, 5 Fed. Reg. 2647; and April 1, 1941, 6 Fed. Reg. 1476.

[5] Cf. Department of Labor Release R-226, March 18, 1939; G-60, July 24, 1940.

[6] A flat mileage definition was in force during part of the time material in this case, but was abandoned after its effects, by way of creating serious unfair discrimination between competing establishments and narrowing growers' outlets, became evident. Cf. Department of Labor Release G-60, July 24, 1940.

[7] Cf. Farm and Ranch Schedules, U. S. Census of Agriculture, 16th Census of the United States, 1940.

The mere enumeration of these instances indicates some of the variables involved. Others add to the difficulty. Highly perishable crops, as fruits and vegetables, require immediate action in these stages of handling. Cotton, grains, root crops, etc., less perishable, may wait longer on the farm, some for months, before these processes become necessary. Some crops are highly concentrated for production in a few regions, such as citrus fruits in Florida, Southern Texas, and Southern California, but are marketed on a nation-wide scale. Others have regional areas of production, like cotton in the South, celery in Michigan, tobacco in the border states and a few northern regions, yet depend on the national market. Still others have regions of greater or less concentration, but are grown all over the nation, like wheat and other grains, apples, potatoes, etc.

Obviously, "area of production," in the sense of where the commodity is produced for purposes of commercial marketing, will vary from the whole nation, in the case of the more common grains, fruit crops and root crops, down to a few highly concentrated regions or areas in the case of others more dependent upon special climatic and soil combinations. And between the extremes of nation-wide and highly localized production are all ranges of sectional and regional production areas.[8]

Respondent regards the "area of production" as the whole region where a commodity is grown, and therefore says the Administrator has no more to do than locate the existing limits of these areas. By this criterion the South, perhaps including California, would be the unalterable "area of production" for cotton, the whole nation for eggs, wheat, corn, etc. This conception would nullify the delegation, making of the Administrator merely a surveyor in the wrong place. Congress clearly was not making him only a finder of fact, namely, of the geographical limits surrounding regions where 300 different commodities are produced. Such a view would exempt all employees engaged in the operations specified in Section 13(a)(10).

[8] As the legislative history shows, cf. text *infra* at notes 13-16, there was fairly general agreement that some part of the work specified in Section 13(a)(10) should be exempt, whether or not it was done on the farm. But beyond this, a great variety of opinion existed both as to how far the exemption should go and as to the economic basis for it. Among the latter were views that the exemption should be made because the farmer bore the cost of the work, cf. 81 Cong. Rec. 7656, 7877, 7880; or because many farmers in fact performed it on their farms and as part of their operations, cf. Section 3(f),

The same objections forbid regarding the "area of production" as the region from which the particular plant purchases its raw material. The only substantial difference would be to make the Administrator's fact finding task a more impossible one. A definition would be required for every plant engaging in any of the specified operations for each of the more than 300 agricultural and horticultural commodities produced annually in the United States. Congress hardly could have intended to load upon the Administrator a task of these infinite proportions. Nor did it intend the employer to define its own exemption, or to make that exemption automatic. Congress intended the Administrator to define the area of production. It did not at the same time intend to overwhelm him with making myriads of particular and highly variable definitions for each operating unit, or to make him merely a runner of courses and distances, whether large or small. It rather intended him to make practical, workable and therefore generic and stable definitions.

It follows necessarily that the Administrator's power is discretionary and the important questions are to what extent and in what manner may his discretion work. Neither subdivision (a)(10) nor Section 13 as a whole supplies these answers. The section itself does not supply all the standards necessary for definition of the term. At most it affords direction to exempt some but not other employees engaged in the specified activities and that those exempted must be within the "area of production." This necessarily includes some region where the commodity is produced. But since that region is an unknown quantity and so also is the question what employees within it are to be exempted, solutions must be found either in other provisions of the statute or in the legislative history, unless the delegation is to fall for want of standards.

---

52 Stat 1060; 81 Cong. Rec. 7657-7659; or because others who had to resort to independent contractors to have it done would be discriminated against unless the work were exempt; cf. 81 Cong. Rec. 7656, 7658-7660, 7876. Some legislators were concerned to have the exemption apply whether the work were done in large or small plants; others to limit it to small ones only; and still others to secure it completely for particular crops. Numerous amendments were tendered, but for the most part defeated. It was not until the Conference Committee's report was framed that the problem was solved by referring it to definition by the Administrator. But even proponents of the amendments which were adopted recognized that the problem was one which "the board . . . would have to decide," 81 Cong. Rec. 7878, "something that would have to be worked out," 83 Cong. Rec. 7401.

The statute itself furnishes clear guides for directing the Administrator. He is confined, as has been noted, by subsection (a)(10) to employees engaged in the specified initial operations of marketing. They must work within some producing region. Apart from the exemption they are within the Act's coverage, but close to the major line it draws between farm workers, who are excluded from, and industrial labor, which is within its coverage. Depending, not upon what they do, but upon where and how they do this work, they would fall on one side or the other of this line and within or without the incidence of the evils the Act sought to eradicate. These were "the existence, *in industries* . . . of *labor conditions* detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers. . . ."[9] Congress exercised its authority over commerce, "to correct and as rapidly as practicable to eliminate the conditions above referred to *in such industries* without substantially curtailing employment or earning power." Section 2(a), (b). (Emphasis added.)

The broad line between farming and industry runs throughout the Act.[10] It is the statute's basic line of policy between coverage and noncoverage. The line not only is pertinent to each of the statute's provisions but, where the contrary is not clearly and unambiguously stated, it is controlling. There can be no assumption that Congress intended employees in one group to be transferred to or treated as being in the other where no such clear mandate can be found.

In determining what Congress intended by the delegation, it is crucial to keep in mind that, whatever decision the Administrator

---

[9] Section 2(a). These conditions Congress found burden commerce, lead to labor disputes obstructing it, interfere with fair and orderly marketing, and spread themselves by causing the channels of commerce to be used for marketing among the several states the goods produced under them. *Ibid.*

[10] "'Industry' means a trade, business, industry . . . in which individuals are gainfully employed." Section 3(h). "'Agriculture' includes farming in all its branches . . . and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." Section 3(f). Section 5 provides for industry committees and their functioning, to which the Administrator submits data and from which he receives recommendations and reports which he must approve before making them effective in the form of minimum wage rates and industry classifications. Cf. Section 8.

may make and by whatever criteria, the effect of his action must be to put some employees on one side of this line and others on the opposite side. That consequence he cannot escape. And, because he cannot avoid it, the line is pertinent and material to his choice, as it is to all others he must make in performing his duties. It is the statute's lodestar. The distinction between farming and industry is the essence of his determination. An "area of production" determined without reference to this distinction would contradict, not enforce, the statute's basic policy. And this appears, not solely from the policy itself and the effects of failure to take it into account, but from a consideration of other determinations the Act confides to the Administrator and of the manner in which it requires him to make them.

Thus, in issuing minimum wage orders and industry classifications, he and the industry committees must have "due regard to economic and competitive conditions," and act so as not to "substantially curtail employment" or "give a competitive advantage to any group." And there is a specific prohibition against fixing wages or classifications "solely on a regional basis." Rather the governing criteria are to be competitive conditions, wages for comparable work fixed by collective bargaining or by voluntary minimum wage plans. Section 8(b), (c), (d). The statute's primary design was to bring industrial workers under its protections and to eliminate as rapidly as possible the substandard conditions of such labor. But this was to be done with an eye also to two other matters: one, that by too rapid advance employment be not curtailed; and, two, that competitive conditions in the affected industries be not unduly disturbed or competitive advantages created. Cf. Section 2.

These purposes were inescapably pertinent to the problems of exemption arising under Section 13(a)(10). They were likewise pertinent to other exemptions, cf. Section 7(c) and compare Section 7(b), and to still other delegations the statute confided to the Administrator. That Congress did not burden the books with "an itemized catalogue"[11] of standards in each instance of delegation, gives no basis for believing that what permeated all else found these parts insulated. The Administrator clearly had power, and more, the duty, to take account of these factors.

[11] National Broadcasting Co. v. United States, 319 U. S. 190, 219.

If so, he could not escape the question of size. And indeed the Court does not deny this. Size certainly is not irrelevant to distinguish within any group which may do essentially the same work in two different ways, one the farming way, the other the industrial one. It is not irrelevant to economic dislocations or to curtailments of employment. And it is relevant to these things as much within as without an area of production.[12]

The legislative history discloses one object of the exemption as originally proposed was to protect small farmers, who are unable to perform these operations at the farm and therefore are dependent upon whatever nearby establishments may exist, whether large or small. Various members of the Senate and of the House sponsored amendments for this purpose.[13] As the bills went to conference each contained flat exemptions, substantially covering the activities now specified in Section 13(a)(10). But the debates in both houses show that even the sponsors of the various amendments differed or were doubtful concerning whether the amendments would give exemption to large plants.[14] There was general

[12] Respondent however, consistently with its "fact-finder" or "surveyor" theory of the Administrator's function, says the purpose was not to distinguish, within the specified activities, between farmers and industrial workers; it was rather to go a step further and exempt the latter as well, provided only they were within an area of production as respondent conceives it. That the Administrator may exempt some, or perhaps many, who are in fact industrial workers, because they are doing these activities under factory conditions and methods, may be conceded. That he must exempt all of them, or some larger number than his judgment, formed after considering the facts, the statute's policies, and the effects of what he may do, finds proper, cannot be accepted. Respondent claims an exemption fixed by the Act. The statute has given it one only when, in the Administrator's judgment, not arbitrarily formed, it meets the conditions which he finds will execute the legislative policy.

[13] The Senate's first suggestion of "area of production" came from Senator Copeland, 81 Cong. Rec. 7656, although Senator Schwellenbach became the chief proponent of the concept there. Senator Black, sponsor of the bill, was concerned with the scope of "area" and sought a more accurate term for limiting its effect so as not to exempt workers in large plants, cf. 81 Cong. Rec. 7656-7660, 7876-7878, and others expressed opinions that large operators should not be exempted. For portions of the discussion on the Senate floor see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949.

In the House of Representatives, the sponsor of the bill was Representative Norton. Chief proponent of the amendment involving "area of production" was Representative Bierman. Cf. 83 Cong. Rec. 7325-7326, 7401-7408.

[14] Responding to inquiry whether packing houses in Iowa and Illinois would be exempted by his amendment, Representative Bierman said: "Speaking frankly, I think that is something that would have to be worked out." 83 Cong. Rec. 7401. Senator Schwellenbach clearly recognized his amendment would exempt large as well as small packing and similar plants, 81 Cong. Rec. 7877, 7878, but expressed the opinion there would not be "any large or enor-

agreement that small ones should be relieved from coverage.[15] Senator Reynolds went further and proposed several amendments to relieve all small plants from the Act's provisions, not merely those engaged in the limited operations specified in the bills or Section 13(a)(10). These were defeated.[16] And there was vigorous demand, from the sponsor of the bill in the Senate and others,[17] for restricting the scope of the amending exemptions to small plants. These differences were not settled on the floor of either house. But when the bills came to conference, they were resolved by changing the flat exemptions into discretionary ones to be defined by the Administrator.

Since the delegation feature did not appear until the conference report and there is little in that report or in the debates upon it to add light; the previous discussions are wholly inconclusive, except in one respect. This was to show that there was great variety and complexity of opinion, and that this revolved around the question of size. That question continued unresolved up to conference and was resolved there, not by decision either way, but by reference to the Administrator. It must be taken therefore that the purpose was to give him discretion to make the necessary choices between the conflicting viewpoints as the facts of particular situations would give occasion for doing. And, it would seem, the preponderance of sentiment in favor of exempting small plants, but not large ones, except in occasional

mous plants'' in the specified operations. In response to Senator Black's inquiry concerning the indefinite effect of ''area'' without further definition, he said: ''I gave considerable thought to that. I do not believe it is possible, and that is something which the board, which has been accused of receiving too much power, would have to decide. It would have to provide a definition of 'immediate area of production.' '' Cf. 81 Cong. Rec. 7876-7878.

[15] See the discussions cited in notes 8, 13 and 14.

[16] Cf. 81 Cong. Rec. 7948. Respondent argues from this that the intent of Congress was shown not to authorize the Administrator, by the later conference amendment, to distinguish among plants within the ''area of production'' on the basis of size. The argument however ignores the fact that the amendments proposed by Senator Reynolds were drawn and intended to exempt from the statute's operation *all* plants having fewer than the number of employees (the amendments varied from five to ten in this respect), not merely plants engaged in the particular marginal operations specified in the various forms the Schwellenbach Amendment took during the debate. The conclusion to be drawn from the rejection of the Reynolds Amendments is not that the Senate intended to exempt all plants, large and small, covered by the Schwellenbach Amendment or by the form taken by Section 13(a)(10) in conference, but rather that the Senate was unwilling to except even all plants having as few as five employees from the statute's coverage.

[17] Cf. notes 13 and 14, *supra*, and the cited discussions.

nstances where this would be necessary to protect the small armer, well could be taken as his guiding light. The legislative istory, therefore, in so far as it sheds light at all, clearly is not nconsistent with what the Administrator has done, but on the ontrary supports it.

The Court does not find the Administrator acted improperly y taking these considerations into account. He only must not tate them in his definition. And this matter of mere formulaion is the crux of the case. The definition must be made "in elation to the complicated economic factors that operate between *gricultural labor conditions* and *the labor market of enterprises* oncerned with agricultural commodities and more or less near heir production." (Emphasis added.) The Administrator is iven "appropriate discretion to assess all the factors relevant o the subject matter," which is essentially one of "economic letermination," too complex for litigation to solve. He "may roperly weigh and synthesize all such factors."

In making his economic synthesis, however, the Administrator nust state his results only in surveyor's terms. Congress, when it ranted the exemption, "restricted the Administrator to the drawng of geographic lines, even though he may take into account all elevant economic factors. . . ." The "zone within which economic influences may be deemed to operate and outside of which hey lose their force" cannot be defined directly and purposively o draw the line between the zone of farming and the zone of ndustry. This must be done only indirectly, in an awkward, oundabout way.

Nothing prevents the Administrator from drawing the lines as e thinks best, unless the suggestion of the specially concurring pinion is followed that they must be drawn in regular circles or quares. The courts have no business to tell him where to put hem. He can define distance by air lines or by road lines to narket. He can run the lines around big towns, but not around ig factories. Baltimore could be excluded, but not Martin's omber plant or one like it, in size and methods, for processing r canning fruits and vegetables. Towns may go out, though urrounded by truck farms, but not commercial canneries. Residences, apparently, must surround the cannery. In short, the Administrator can draw whatever map lines he thinks will achieve he appropriate economic adjustments, except one which leaves

out perhaps the biggest canning factory of all, and no court can interfere. I do not believe that Congress, when it gave the Administrator his complicated task and authorized him to consider all the relevant and complex economic factors, not only denied him the power to execute those considerations in his action, but compelled him to frustrate them in defining "area of production." The Court does not deny the Administrator may consider the size of the plant, and make this even the crucial factor in his decision. Yet it would only impede or defeat his judgment, formed on proper considerations, as well as the statute's purposes, to require him to state the exemption, not simply in the terms best chosen to express his meaning clearly and definitely, but in others couched in pure though tortured geography. According to his experience and confirmed judgment, shared by successive administrators and never reversed or modified, to require the latter method of formulation would make his task well nigh impossible or, if not that, incapable of being discharged without doing violence to the Act's major purposes and standards.[18]

So much of authority and power to defeat the statute's intended operation cannot be given to mere verbalism, more especially to one word, torn in context, function and purpose from the remainder of the Act. "Area," it is true, means area. But "area of production" means more. "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. . . . A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated."[19] And so does a section in a statute. "Area of production" as used in Section 13(a)(10) means an exemption, limited to persons performing the specified operations within a producing region, but selected from all so situated by an exercise of the Administrator's judgment in accordance with the statute's prime objects and chief limitations, among which necessarily is the size of the plant. If that is so, I see no good reason for forbidding the Administrator to say so.

---

[18] Cf. notes 1-6, *supra*, and text.

[19] United States v. Monia, 317 U. S. 424, dissenting opinion at 431 422.

It follows the Administrator has not improperly exercised his function, the definitions are valid, and respondent's employees were not exempt from the statute's provisions.

II.

But if the definitions were invalid, as the Court holds, I could not agree to the extremely novel disposition it makes of the case. We are dealing with an exemption, not with the statute's primary coverage. Concededly the respondent employer was liable to petitioners for the minimum wages, overtime pay and statutory penalties under Section 16(b), if they were not exempt under Section 13(a)(10) or some other exemption. Ordinarily exemptions are not favored. Coverage, not exemption, is preferred. If the exemption is dubious, it is not given effect. If ambiguous, it is resolved strictly in favor of the statute's application. *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312; *McDonald* v. *Thompson*, 305 U. S. 263. In this case, if the exemption does not apply, the petitioners are within the statute and respondent is liable on their claims.

To escape liability, respondent has the burden of showing the exemption does apply. But to do this it cannot merely show the definition of the Administrator is invalid. That would only leave itself and the petitioning employees subject to the Act's provisions, which require the payment of the claims. Respondent's dilemma therefore is both sharp and real. If the definition is valid, it does not cover these employees and respondent is liable to them. If the definition is invalid, clearly it exempts no one, petitioners are covered by the Act, and the respondent must pay. This is true whether the reason dictating invalidity is want of standards, application of the wrong ones, or merely formulating the result in the wrong way. This dilemma presents the alternative which respondent, the Court of Appeals and this Court have attempted to avoid in order, so it is said, to escape an "either-or" conclusion, which is the kind the law almost always must make. It is one from which there is no escape without exercise of inventive genius beyond the right of either court to apply and which, as applied here, makes the cure worse than the disease.

Respondent's invention, and likewise the Court of Appeal's, was to strike the limitation on the number of employees and apply

the remainder of the definition. This but emasculates it. Hence all here, but one, are agreed such liberty cannot be taken with the Administrator's function. This Court's invention however does it equal or greater violence, first, as I think in emasculating it; second, and lacking even more in justification, in requiring it to be exercised with backward reaching effect.

If the Court had sought its escape in finding that there were no standards to control the Administrator's discretion or that he had applied the wrong standards, one might understand its refusal to sustain the definition. But that too would mean that petitioners would recover. The Court does neither. There is no claim, except a semblance of suggestion in a separate opinion, that the statute supplies no standards and therefore gives the Administrator "a roving commission to create exemptions." Nor is there one that the wrong standards were used. The invention is called forth only to correct a mode of statement.

If that were all, there would not be much room to complain. But, in addition to compelling the Administrator to make the definition in a manner which frustrates his function and the statute's objectives, or only partly fulfills them, the decision opens the door to a general expansion of the novel, and I think unauthorized, practice of retroactive administrative determination of private rights. That is true, unless these petitioners are to be specially treated, although less than a majority of the Court agree that the authorities cited to sustain it justify the procedure outlined. But if the procedure is justified in this case, it is in any other where an administrator mistakenly includes in a regulation a factor later held to make it invalid. No reason stated makes this case a special one. And there is none. It cannot be taken that these parties are to be singled out for unique treatment, merely in order to avoid the normal legal consequences of invalidating administrative action. Hence, every interest affected by such action now must take two risks in place of one: first, the normal, inescapable risk that the governing regulation may be held invalid; second, in that event, the novel one that some future regulation, a wholly unknown quantity, will relate back over an indefinite time to create entirely new or different and unexpected rights and liabilities.

Of course there must be room for creative analogies in the law to give the desired escape from mechanical concepts and permit

shaping its remedies. But we are as often told that Congress should perform the creative act in Congress' field. This should be most true where what we are called upon to recreate is Congress' own handiwork. If Congress intended the Administrator to act retroactively, Congress wholly failed to express this purpose.

Moreover, it is not remedies but rights which are thus refashioned. And not equity but law remolds them. Who knows, before the redefinition, what persons may be included in its coverage? Or whether it may not have to be made again? The same persons cannot be included. Otherwise there would be no point to this decision. If the Administrator can rephrase the same coverage in wholly geographic terms, apart from delay the only result will be to have criticized his language. If he cannot do this some persons, and no one can tell in advance how many, will be deprived altogether of rights, others given them who had none. So with liabilities.

The innovation would be serious if confined to this case or this Act. It is beyond prediction what the consequences may be, of uncertainty, or hardship, of injustice in deprivation of rights, in windfalls of right to others, in laying on new and wholly unexpected liabilities and in relieving from anticipated ones, if retroactive administrative refashioning becomes the general practice. The alternative, either to sustain or to hold void the regulation, and fix the rights accordingly, is not only the accepted and established one. It is the only one by which men can know the risks they assume at the time they become subject to them.

Retroactivity is not favored in law. For this there are sound reasons, in some cases constitutional ones. Cf. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139. There are few occasions when retroactivity does not work more unfairly than fairly. Congress, the state legislatures and the courts apply the principle sparingly, even where they may. Cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *United States* v. *Heinszen*, 206 U. S. 370. Seldom if ever therefore may administrative or executive authority to apply it be inferred from legislation not expressly giving it. Compare *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. R.*, 284 U. S. 370; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110. But, in any event, whatever corrective needs may prompt and vindicate a grant of such authority in other circumstances are not present in this application. Yet, if this de-

cision is to mark the beginning of a general pattern, such authority now bids fair to become a common characteristic of administrative action.

The administrative process has increasingly important functions in our legal system. Ordinarily it does enough, if it takes care of today and tomorrow. When it begins to add yesterday, without clear congressional mandate, the burden may become too great. In any event, that has not heretofore generally been considered its task. If that task is to be added, the addition should be made by the body whence administrative power is derived, not by this Court's imaginative resourcefulness.

Finally, respondent has not asked for this retroactive "relief." And this may be for entirely good reasons of its own. What respondent sought in the District Court, what it secured in the Court of Appeals, and what it has sought here, but clearly is not entitled to have, is a judicial declaration that, as a matter of law, its employees would have been exempt under any valid definition the Administrator might have adopted. In effect, this is a claim of exemption by the statute itself, one which would nullify the Administrator's power. Relief not sought should not be forced on respondent by an exercise of this Court's inventive genius. More especially should this not be done on the court's own motion, without any of the parties having had an opportunity to consider or discuss it in the briefs or in argument. Under such a policy, generally followed, a litigant never can know with what kind of gift horse he may come out, even if successful. And in this case the parties have faced the double uncertainty, wholly unanticipated, of creation here and recreation by the Administrator, when the latter undertakes relieving the District Court of the duty to await his further action.[20]

The judgment of the Court of Appeals should be reversed and the cause should be remanded to that court for determination of the other issues in the case.[21]

Mr. Justice DOUGLAS joins in that part of this dissent which would hold that the Administrator has defined "area of production" in a valid manner.

---

[20] The Administrator is not a party to this suit, but has appeared and participated here as *amicus curiae*.

[21] In view of its disposition of the case, the Court of Appeals did not consider respondent's defenses under Sections 7(b) and 7(c) of the Act, on both of which the District Court held for petitioners.